TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 30

MERCHANTS NATIONAL BANK OF BOSTON,
EXECUTOR, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 29, 1943.

CERTIORARI GRANTED MAY 3, 1943.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3787.

COMMISSIONER OF INTERNAL REVENUE,

PETITIONER FOR REVIEW,

v.

MERCHANTS NATIONAL BANK OF BOSTON, Executor.

PETITION FOR REVIEW OF DECISION OF UNITED STATES BOARD OF TAX APPEALS.
DECISION, DECEMBER 17, 1941.

RECORD ON PETITION FOR REVIEW.

SAMUEL O. CLARK, JR.,
ASSISTANT ATTORNEY GENERAL,
SEWALL KEY,
SPECIAL ASSISTANT TO THE ATTORNEY GENERAL,
for Petitioner.
EDWARD C. THAYER,
for MERCHANTS NATIONAL BANK, *Executor.*

BOSTON:
PRINTED UNDER DIRECTION OF THE CLERK.
1942

TABLE OF CONTENTS.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1941.

No. 3787.

COMMISSIONER OF INTERNAL REVENUE,
PETITIONER,
v.
MERCHANTS NATIONAL BANK OF BOSTON, EXECUTOR,
RESPONDENT.

RECORD ON PETITION FOR REVIEW.

[FILED IN CIRCUIT COURT OF APPEALS JUNE 8, 1942.]

DOCKET NO. 105004.

ESTATE OF OZRO MILLER FIELD, THE MERCHANTS NATIONAL BANK OF BOSTON, Executor, Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent.

APPEARANCES.

For Taxpayer: Edward C. Thayer, Esq.

For Commissioner: J. T. Haslam, Esq.

DOCKET ENTRIES.

1940

Sept. 30 – Petition received and filed. Taxpayer notified. (Fee paid).

Sept. 30 – Copy of petition served on General Counsel.

Sept. 30 – Request for circuit hearing in Boston, Mass., filed by taxpayer. 9/30/40 copy served.

1940

Nov. 4 – Answer filed by General Counsel.

Nov. 4 – Request for hearing in Boston, Mass., filed by General Counsel.

Nov. 7 – Copy of answer and request served on taxpayer. Boston, Mass., Calendar.

Dec. 30 – Hearing set Feb. 24, 1941 in Boston, Mass.

1941

Feb. 26 – Hearing had before Mr. Murdock on the merits. Submitted. Consolidated for hearing with 105005. Briefs due as per rules.

Mar. 14 – Transcript of hearing 2/26/41 filed.

Apr. 4 – Motion for extension to May 1, 1941 to file brief filed by General Counsel.

Apr. 11 – Brief filed by taxpayer.

Apr. 15 – Motion for extension to April 28, 1941 to file brief filed by General Counsel.

Apr. 17 – Brief lodged by General Counsel.

Apr. 17 – Motion of April 4, 1941, granted.

Apr. 18 – Copy of brief served on General Counsel.

May 2 – Reply brief filed by taxpayer.

Oct. 7 – Findings of fact and opinion rendered, Murdock, Div. 3. Decision will be entered under Rule 50.

Dec. 13 – Agreed computation of deficiency filed.

Dec. 17 – Decision entered, J. E. Murdock, Div. 3.

1942

Mar. 10 – Petition for review by United States Circuit Court of Appeals, First Circuit, filed by General Counsel.

Mar. 13 – Proof of service filed.

Mar. 21 – Proof of service filed by General Counsel.

Apr. 11 – Joint motion for extension to 6/8/42 to prepare and transmit the record filed.

Apr. 11 – Order enlarging time to June 8, 1942, to prepare and transmit the record filed.

May 21 – Statement of points to be relied on filed by General Counsel, with statement of service by mail thereon.

1942

May 21 – Designation for record on review filed by General Counsel with statement of service by mail thereon.

May 29 – Designation of additional portions of the record filed by taxpayer. Service by mail thereon.

June 1 – Proof of service of filing designation of additional portions of record filed by taxpayer.

June 2 – Agreed motion for correction of the record filed. 6/2/42 granted.

DOCKET NO. 105005.

ESTATE OF OZRO MILLER FIELD, THE MERCHANTS NATIONAL BANK OF BOSTON, Executor, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

APPEARANCES.

For taxpayer: Edward C. Thayer, Esq.

For Commissioner: J. T. Haslam, Esq.

DOCKET ENTRIES.

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Apr. 17 – Motion of April 4, 1941 granted.

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May 2 – Reply brief filed by taxpayer.

Oct. 7 – Findings of fact and opinion rendered, Murdock. Decision will be entered under Rule 50.

Nov. 25 – Stipulation *re* fee filed.

Dec. 13 – Agreed computation of deficiency filed.

Dec. 17 – Decision entered, J. E. Murdock, Div. 3.

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[illegible]

estate, real, personal and mixed, of every kind, nature and description, wheresoever the same may be situated, located or found, whether within the Commonwealth or without, of which I shall die seized and possessed or to which I shall be entitled at the time of my decease, or over which I then have any power of appointment or disposal whatsoever, to The Merchants National Bank of Boston, a banking corporation having a usual place of business at Boston, Massachusetts. In Trust Nevertheless, for the following uses and purposes, to wit:—To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarter-annually, or oftener in the discretion of my said Trustee, to my said wife, May L. Field, during the term of her natural life.

My said Trustee shall also have the right to pay to, or for the benefit of my said wife, May L. Field, such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust.

Upon the death of my said wife, May L. Field, she dying after me, my said Trustee shall retain the sum of One Hundred Thousand Dollars ($100,000) and hold the same In Trust for the following uses and purposes, to wit: To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income,

to pay the net income derived therefrom quarter-annually, or oftener in the discretion of my said Trustee, as follows:— one-quarter to my adopted daughter, Deborah Jensen, now of Beverly, Massachusetts, during the term of her natural life; one-quarter to my adopted daughter, Elizabeth Harnden, now of Brookline, Massachusetts, during the term of her natural life; one-quarter to my adopted son, Robert M. Field, now of Peabody, Massachusetts, during the term of his natural life, and one-quarter to Dora L. Russell, niece of my said wife, now of Peabody, Massachusetts, during the term of the natural life of said Dora L. Russell. As and when each of the last four above-named beneficiaries shall decease, I direct my said Trustee to pay the income to which he or she would have been entitled if he or she had lived, in equal shares to Beverly Hospital Corporation, of Beverly, Massachusetts, and The Palmer Memorial Unit of New England Deaconess Hospital, now located at 195 Pilgrim Road in Boston, Massachusetts, until the last survivor of the said Deborah Jensen, Elizabeth Harnden, Robert M. Field and Dora L. Russell shall have deceased, and upon the death of the last survivor of them, I direct my said Trustee to pay over and distribute the whole corpus or principal of this One Hundred Thousand Dollar Trust Fund, together with accumulated income, in equal shares, to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust.

The balance or remainder of the corpus or principal of the trust estate after the death of my said wife, she dying after me, I direct my said Trustee to pay over and distribute in equal shares to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust."

B. Said Beverly Hospital Corporation and said New England Deaconess Hospital are both corporations organized and operated

exclusively for charitable purposes and no part of their earnings inures to the benefit of private stockholders or individuals, and no substantial part of their activities is carrying on propoganda or otherwise attempting to influence legislation.

C. In the taxable year ending December 31, 1937, the petitioner sold 2,000 shares of the preferred stock and 7,910 shares of the common stock of the Kennedy Company, a Massachusetts corporation, and 16 shares of stock of Radio Corporation of America, which were a part of the corpus of the trust under the decedent's will, realizing a net capital gain, as determined by the Commissioner pursuant to adjustments which are not complained of, in the amount of $130,900.31.

D. At the date of the decedent's death, his wife, Mrs. May L. Field, was sixty-seven years old. The petitioner, which is also the duly appointed trustee under said Article Third, has not paid Mrs. Field anything from the principal of the trust fund.

E. Mr. Field had retired from business, and prior to his death he and Mrs. Field had been living in a comfortable manner, within the income of their property, at the rate of $7,000 to $8,000 a year. They had a furnished apartment in Beverly, and a summer home belonging to Mrs. Field in Buckland, Massachusetts. They had no children, but Mr. Field had adopted three children, who were not adopted children of Mrs. Field. These children were all of age and two of them were married and in no way dependent on Mr. and Mrs. Field for support. They contributed $15 a week to the support of the third, Robert Field, who had just come of age, and he has since become self-supporting. They made presents from time to time to the children.

F. Since Mr. Field's death Mrs. Field has continued to live in the summer at her place in Buckland, employing, as formerly, a housekeeper and a chore boy. In the wintertime she has resided at the Hawthorne Inn in Salem, and latterly at the Hotel Vendome in Boston, both first-class residential hotels. Her standard of living and her mode of life is the same which she enjoyed in the lifetime of the decedent. Her total expenditures, including taxes

and contributions to charity and relatives, have been at the rate of approximately $8,000 a year, or, from the date of death to the date of filing this petition, a period of four years and about five months, approximately $36,000.

G. From the date of the decedent's death to the date of filing this petition Mrs. Field's income from all sources has been approximately $91,600. Her income from her husband's estate and the trust under his will has been approximately $12,000 a year. The fiduciary funds are conservatively invested and include approximately $41,000 held in cash. Upon termination of the existing tax controversies this fund can be invested and the income from the trust increased. Her income from her separate property has been approximately $5,500 a year. To provide for annual expenditures of the order of $8,000, she has been in receipt of an income of the order of $18,000 a year.

H. Mrs. Field's personal estate has increased from approximately $85,000 at the time of her husband's death to approximately $150,000 at the time of filing this petition, notwithstanding that she paid $2,500 of Massachusetts inheritance tax on jointly owned property. She has increased her checking account by over $22,000 and her savings bank accounts by over $20,000, and she has continued to hold securities (principally stock of American Telephone & Telegraph Company, United Fruit Company and General Motors Corporation) which are now worth approximately $91,000.

The capital value of the property held for her benefit by the petitioner under her husband's will has also increased from approximately $260,000 at the time of the decedent's death, after providing for estate and inheritance taxes, to approximately $320,000.

I. Mrs. Field was told by Mr. Field that he had accumulated his fortune from the public and that it should go back to the public through charity. She entertains the same conviction and has executed her will, leaving the residue of her personal estate to charity also. She is able to live in complete comfort and hap-

ess on very much less than the income available to her and
s not intend to suffer the charitable remainders left by her
band's will to be impaired by any expenditures for her benefit.
. The petitioner does not propose to make any expenditures
m the principal of the trust for the benefit of Mrs. Field ex-
t such expenditures, if any, as may be requisite to protect Mrs.
ld from adversity and to enable her to be maintained in the
ne comfortable station in life and continue the same manner
living she enjoyed as the wife of the decedent.

K. The possibility that any of the principal of the residuary
st will ever be paid to Mrs. Field is so remote as to be merely
demic; and the capital gains in question should be held to
e been permanently set aside in the taxable year for charitable
poses as contemplated by section 162(a) of the Revenue Act
1934, and are, consequently, allowable deductions from the
itioner's gross income.

Wherefore the petitioner prays that this Board may hear the
ceeding and redetermine the deficiency.

EDWARD C. THAYER,
Counsel for the Petitioner,
53 State Street, Boston, Mass.

MMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK, ss.

Albert H. Waite, being duly sworn, says that he is an assistant
st officer of The Merchants National Bank of Boston, the peti-
ner above named, and as such is duly authorized to verify the
egoing petition; that he has read the foregoing petition, or had
same read to him, and is familiar with the statements con-
ned therein, and that the statements contained therein are
e, except those stated to be upon information and belief, and
t those he believes to be true. ALBERT H. WAITE.

ubscribed and sworn to before me this twenty-eighth day of
tember, 1940. MIRIAM BUTLER,
NOTARIAL SEAL] *Notary Public.*

My commission expires November 5, 1943.

EXHIBIT A.

Form 1230 Copy SN-IT-1

Treasury Department Internal Revenue Service

Office of Internal Revenue Agent in Charge Boston Division

140 Federal Street

Aug. 2, 1940

Estate of Ozro M. Field, The Merchants National Bank of Boston, Executor, 28 State Street, Boston, Massachusetts,

Registered Mail

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1937 discloses a deficiency of $42,825.69 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Boston, Mass. for the attention of TMK:90-D. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING, Commissioner,

By (Sgd.) T. M. Kenefick,

Internal Revenue Agent in Charge

Enclosures: Statement. Form of waiver.

TMK:HWL:ASH:c

Boston Division

STATEMENT

Estate of Ozro M. Field, The Merchants National Bank of Boston, Executor, 28 State Street, Boston, Massachusetts.

Tax Liability for Taxable Year Ended December 31, 1937.

	Liability	Assessed	Deficiency
Income tax	$44,184.01	$1,358.32	$42,825.69

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated June 9, 1939; to your protest submitted in January, 1940 and to the statements made at the conference held on January 16, 1940.

A copy of this letter and statement has been mailed to your representative, Edward C. Thayer, Esquire, 53 State Street, Boston, Massachusetts, in accordance with the authority contained in the power of attorney executed by you and on file with this office.

Net income of $16,525.52 as returned for the year 1937 is increased by the sum of $100,900.31 to reflect the capital gains realized on the sales of corpus assets.

Careful consideration has been given to your contention that the said amount is deductible under Section 162, Revenue Act of 1936, on the theory that the amount in question was permanently set aside for the Beverly Hospital Corporation and/or The Palmer Memorial Unit of New England Deaconness Hospital during the year 1937. That contention cannot be sustained because the decedent in his last will and testament, Clause 3, gave the trustee power to invade corpus of the trust for the benefit of the Decedent's wife, which makes it impossible to determine the amount, if any, which the charitable legatees will eventually receive.

Adjustments to Net Income

Net income as disclosed by return	$16,525.52
Unallowable deductions and additional income:	
(a) Taxable capital gain	$100,900.31
Net income adjusted	$117,425.83

Explanation of Adjustments

(a) Taxable capital gain $100,900.31

On line 7 of your return for the year 1937 (Form 1041) you reported capital gain in the amount of $130,900.31 but in computing your taxable net income on line 17 of said return you deducted said gain of $130,900.31 on the ground that it was permanently set aside for purposes contemplated by section 162 of the Revenue Act of 1936. You are now advised that capital gain realized by you during 1937 in an adjusted amount of $100,900.31 is deemed to be taxable to you for reasons stated in the foregoing paragraphs contained herein.

Capital gain included on line 7 of return	$130,900.31
As corrected herein	100,900.31
Adjustment	$30,000.00

Gain on sale of 2,000 shares of Kennedy Company 7% Preferred Stock has been reduced from $95,860.00, as reported in your return, to $65,860.00 in accordance with the recommendation of the Technical Staff.

Computation of Tax

Net income adjusted		$117,425.83
Less: Personal exemption		1,000.00
Balance (subject to normal tax and surtax)		$116,425.83
Normal tax at 4 percent	$4,657.03	
Surtax	39,526.98	
Correct income tax liability		$44,184.01
Tax previously assessed, account No. 186765 (Mass.)		1,358.32
Deficiency of income tax		$42,825.69

Docket No. 105004.

[Title omitted.]

ANSWER.

[Filed November 4, 1940.]

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in answer to the petition filed herein, admits and denies as follows:

I. Admits the allegations contained in paragraph I of the petition.

II. Admits the allegations contained in paragraph II of the petition.

III. Admits the allegations contained in paragraph III of the petition excepting the allegation as to the amount of tax in controversy, which allegation is denied.

IV. Denies that the determination of tax set forth in the notice of deficiency is based upon error as alleged in paragraph IV of the petition.

V. A to K, inc. Denies the allegations of fact and other matter contained in subparagraphs A to K, inclusive, of paragraph V of the petition.

Denies generally and specifically each and every allegation contained in the petition, not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

J. P. WENCHEL, JTH,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

CHARLES P. REILLY,
Division Counsel.

J. T. HASLAM, *Special Attorney,*
Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 105005.

Estate of Ozro Miller Field, The Merchants National Bank of Boston, Executor, Petitioner

v.

Commissioner of Internal Revenue, Respondent.

PETITION.

[Filed September 30, 1940.]

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency, symbols TMK:JJH:mgo, dated July 3, 1940; and as a basis of its proceedings alleges as follows:

I. The petitioner is a corporate fiduciary, with principal offices at 28 State Street, Boston, Massachusetts. The return for the period here involved was filed with the Collector of Internal Revenue at Boston in the District of Massachusetts.

II. The notice of deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to the petitioner on July 3, 1940.

III. The tax in controversy is estate tax upon the Estate of Ozro Miller Field, a decedent, who died May 3, 1936, a citizen of the United States, residing at Beverly, Massachusetts, and in the amount of approximately $26,290.93.

IV. The determination of tax set forth in the said notice of deficiency is based upon the following error:

Disallowance as a deduction from the gross estate of $128,276 claimed on Schedule N of the return as the value of remainder interests given to charity, and failure to increase such deduction in accordance with other adjustments made in said deficiency letter which are not complained of.

V. The facts upon which the petitioner relies as a basis of this proceeding are as follows:

A. Article Third of the will of the decedent provides:

"Third. If my said wife, May L. Field, shall be living at the time of my decease, then and in that case I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, of every kind, nature and description, wheresoever the same may be situated, located or found, whether within this Commonwealth or without, of which I shall die seized and possessed or to which I shall be entitled at the time of my decease, or over which I then have any power of appointment or disposal whatsoever, to The Merchants National Bank of Boston, a banking corporation having a usual place of business at Boston, Massachusetts, In Trust, Nevertheless, for the following uses and purposes, to wit:—To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarter-annually, or oftener in the discretion of my said Trustee, to my said wife, May L. Field, during the term of her natural life.

My said Trustee shall also have the right to pay to, or for the benefit of my said wife, May L. Field, such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust.

Upon the death of my said wife, May L. Field, she dying after me, my said Trustee shall retain the sum of One Hundred Thousand Dollars ($100,000) and hold the same In

Trust for the following uses and purposes, to wit: To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarter-annually, or oftener in the discretion of my said Trustee, as follows:— one-quarter to my adopted daughter, Deborah Jensen, now of Beverly, Massachusetts, during the term of her natural life; one-quarter to my adopted daughter, Elizabeth Harnden, now of Brookline, Massachusetts, during the term of her natural life; one-quarter to my adopted son, Robert M. Field, now of Peabody, Massachusetts during the term of his natural life; and one-quarter to Dora L. Russell, niece of my said wife, now of Peabody, Massachusetts, during the term of the natural life of said Dora L. Russell. As and when each of the last four above-named beneficiaries shall decease, I direct my said Trustee to pay the income to which he or she would have been entitled if he or she had lived, in equal shares to Beverly Hospital Corporation, of Beverly, Massachusetts, and The Palmer Memorial Unit of New England Deaconness Hospital, now located at 195 Pilgrim Road in Boston, Massachusetts, until the last survivor of the said Deborah Jensen, Elizabeth Harnden, Robert M. Field and Dora L. Russell shall have deceased, and upon the death of the last survivor of them, I direct my said Trustee to pay over and distribute the whole corpus or principal of this One Hundred Thousand Dolla: Trust Fund, together with accumulated income, in equal shares, to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconness Hospital, free and discharged of this trust.

The balance or remainder of the corpus or principal of the trust estate after the death of my said wife, she dying after me, I direct my said Trustee to pay over and distribute in equal shares to said Beverly Hospital Corporation and said

"The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust."

B. Said Beverly Hospital Corporation and said New England Deaconess Hospital are both corporations organized and operated exclusively for charitable purposes and no part of their earnings inures to the benefit of private stockholders or individuals, and no substantial part of their activities is carrying on propoganda or otherwise attempting to influence legislation.

C. At the date of the decedent's death, his wife, Mrs. May L. Field, was sixty-seven years old. The petitioner, which is also the duly appointed trustee under said Article Third, has not paid Mrs. Field anything from the principal of the trust fund.

D. Mr. Field had retired from business and, prior to his death, he and Mrs. Field had been living in a comfortable manner, within the income of their property, at the rate of $7,000 to $8,000 a year. They had a furnished apartment in Beverly and a summer home belonging to Mrs. Field in Buckland, Massachusetts. They had no children, but Mr. Field had adopted three children, who were not adopted children of Mrs. Field. These children were all of age and two of them were married and in no way dependent on Mr. and Mrs. Field for support. They contributed $15 a week to the support of the third, Robert Field, who had just come of age, and he has since become self-supporting. They made presents from time to time to the children.

E. Since Mr. Field's death Mrs. Field has continued to live in the summer at her place in Buckland, employing, as formerly, a housekeeper and a chore boy. In the wintertime she has resided at the Hawthorne Inn in Salem, and latterly at the Hotel Vendome in Boston, both first-class residential hotels. Her standard of living and her mode of life is the same which she enjoyed in the lifetime of the decedent. Her total expenditures, including taxes and contributions to charity and relatives, have been at the rate of approximately $8,000 a year, or, from the date of death to the date of filing this petition, a period of four years and about five months, approximately $36,000.

F. From the date of the decedent's death to the date of filing this petition Mrs. Field's income from all sources has been approximately $[illegible]. Her income from her husband's estate and the trust under his will has been approximately $[illegible] a year. The fiduciary funds are conservatively invested and include approximately $[illegible] held in cash. Upon termination of the existing tax controversies this fund can be invested and the income from the trust increased. Her income from her separate property has been approximately $[illegible] a year. To provide for annual expenditures of the order of $[illegible] a year, she has been in receipt of an income of the order of $[illegible] a year.

G. Mrs. Field's personal estate has increased from approximately $[illegible] at the time of her husband's death to approximately $[illegible] at the time of filing this petition, notwithstanding that she paid $2,700 of Massachusetts inheritance tax on jointly owned property. She has increased her checking account by over $22,000 and her savings bank accounts by over $200,000, and she has continued to hold securities (principally stock of American Telephone & Telegraph Company, United Fruit Company and General Motors Corporation) which are now worth approximately $91,000.

The capital value of the property held for her benefit by the petitioner under her husband's will has also increased from approximately $2[illegible],000 at the time of the decedent's death, after providing for estate and inheritance taxes, to approximately $320,000.

H. Mrs. Field was told by Mr. Field that he had accumulated his fortune from the public and that it should go back to the public through charity. She entertains the same conviction and has executed her will, leaving the residue of her personal estate to charity also. She is able to live in complete comfort and happiness on very much less than the income available to her and does not intend to suffer the charitable remainders left by her husband's will to be impaired by any expenditures for her benefit.

I. The petitioner does not propose to make any expenditures from the principal of the trust for the benefit of Mrs. Field

except such expenditures, if any, as may be requisite to protect Mrs. Field from adversity and to enable her to be maintained in the same comfortable station in life and continue the same manner of living she enjoyed as the wife of the decedent.

J. The possibility that any of the principal of the residuary trust will ever be paid to Mrs. Field is so remote as to be merely academic, and such principal should be held to have been bequeathed under the terms of her husband's will for charitable purposes.

Wherefore the petitioner prays that this Board may hear the proceeding and redetermine the deficiency.

EDWARD C. THAYER,
Counsel for the Petitioner,
53 State Street, Boston, Mass.

COMMONWEALTH OF MASSACHUSETTS,
COUNTY OF SUFFOLK, ss.

Albert H. Waite, being duly sworn, says that he is an assistant trust officer of The Merchants National Bank of Boston, the petitioner above named, and as such is duly authorized to verify the foregoing petition; that he has read the foregoing petition, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those he believes to be true. ALBERT H. WAITE.

Subscribed and sworn to before me this twenty-eighth day of September, 1940. MIRIAM BUTLER,
[NOTARIAL SEAL] *Notary Public.*

My commission expires November 5, 1943.

EXHIBIT A.

Form 1236 Copy SN-ET-1

Treasury Department Internal Revenue Service
Office of Internal Revenue Agent in Charge Boston Division
Est. of Ozro Miller Field

Jul. 3, 1940

Registered Mail

The Merchants National Bank of Boston, Executor, 28 State Street,
Boston, Massachusetts,

Gentlemen:

You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of $26,290.93, as shown in the statements attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Internal Revenue Agent in Charge, Boston, Mass. for the attention of Estate Tax Division. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING, Commissioner,
By (Sgd). T. M. Kenefick
Internal Revenue Agent in Charge.

TMK:JJH:mgo

Enclosures: Statement. Form or waiver.

MT-ET:13069-Massachusetts

Est. of Ozro Miller Field Date of Death: May 3, 1936

STATEMENT

The deficiency results from the following adjustments:

Gross Estate

Schedule B, Stocks and Bonds

	Returned	Determined
Item 1	$52,981.25	$52,718.75 (a)
Item 3	3,575.00	3,625.00 (b)
Item 6	150,000.00	180,000.00 (c)

Schedule E, Jointly Owned Property

Item 1	52,981.25	52,718.75(d)

Deductions

Charitable, public, and similar gifts and bequests	128,276.94	None (e)

(a) and (d) The value of 350 shares of stock of American Telephone and Telegraph company is determined to be $52,718.75 (*i.e.* $150-5/8 per share) rather than $52,981.25 (*i.e.* $151-3/8 per share) as returned. The resulting reduction in gross estate amounts to $262.50 in each Schedule B, Item 1, and Schedule E, Item 1.

(b) The value of 100 shares of General Electric Company common stock is determined to be $3,625.00 (*i.e.* $36-1/4 per share) rather than $3,575.00 (*i.e.* $35-3/4 per share) as returned The resulting increase in gross estate is $50.00.

(c) The value of 2,000 shares of 7% preferred stock of The Kennedy Company, Boston, Massachusetts, is determined to be $180,000.00 (*i.e.* $90.00 per share) rather than $150,000.00 (*i.e.* $75.00 per share) as returned.

(e) Deduction claimed for charitable, public, and similar gifts and bequests is disallowed because the decedent in his last will and testament, Clause 3, gave the trustee power to invade the

corpus of the trust, which makes it impossible to determine the amount, if any, which the charitable legatees will eventually receive.

In view of the foregoing the Federal Estate Tax Liability of this estate is finally determined as follows:

	Determined
Gross Estate	366,527.66
Deduction (1926 Act)	117,967.86
Net Estate (1926 Act)	248,559.80
Net Estate	308,559.80
Gross Tax (1926 Act)	6,442.39
Credit for state, estate, inheritance, legacy or succession taxes	4,844.32
Net Tax (1926 Act)	1,598.07
Total Gross Taxes (1926 & 1932 Acts)	48,311.96
Gross Tax (1926 Act)	6,442.39
Net Additional Tax	41,869.57
Net Tax (1926 Act)	1,598.07
Total Net Tax	43,467.64
Amount shown on Return	17,176.71
Deficiency	26,290.93

The deficiency bears interest at the rate of six per cent per annum from fifteen months after the decedent's death to the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

Upon receipt of a waiver or upon the expiration of ninety days from the date of this letter if a petition is not filed with the Board of Tax Appeals, $25,981.34 of the deficiency will be assessed. Credit is allowed for state, estate, inheritance, legacy or succession taxes in the sum of $4,844.32 actually paid and supported by proof required by Regulations 80, Article 9 (b).

As the balance of the deficiency may be eliminated by credit for State or Territorial Estate, inheritance, legacy or succession taxes, opportunity will be accorded for the submission of the evidence required by Article 9 of Estate Tax Regulations 80. If after a reasonable time the evidence is not filed, the balance of the deficiency will be assessed. Please advise when the submission of this evidence may be expected.

Docket No. 105005.

[Title omitted.]

ANSWER.

[Filed November 4, 1940.]

Comes now the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in answer to the petition filed herein, admits and denies as follows:

I. Admits the allegations contained in paragraph I of the petition.

II. Admits the allegations contained in paragraph II of the petition.

III. Admits the allegations contained in paragraph III of the petition excepting as to the amount of tax in controversy which allegation is denied.

IV. Denies that the determination of tax set forth in the notice of deficiency is based upon error as alleged in paragraph IV of the petition.

V. Denies the allegations of fact and other matters contained in subparagraphs A to J, inclusive, of paragraph V of the petition.

Denies generally and specifically each and every allegation contained in the petition, not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the appeal be denied.

J. P. WENCHEL, JTH,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

CHARLES P. REILLY,
Division Counsel.

J. T. HASLAM,
Special Attorney, Bureau of Internal Revenue.

UNITED STATES BOARD OF TAX APPEALS.

Estate of Ozro Miller Field, The Merchants National Bank of Boston, Executor, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Docket Nos. 105004, 105005. Promulgated October 7, 1941.

Deductions—Charitable Uses.—The corpus of a testamentary trust could be used if in the discretion of the trustee it was necessary for the "comfort, support, maintenance, and/or happiness" of the life tenant. The remainder went to charities. *Held*, the possibility of invading corpus was sufficiently remote to justify deduction of the charitable bequest for estate tax purposes and for allowing an income tax deduction under section 162 for capital gains accumulated.

EDWARD C. THAYER, Esq., for the petitioner.
JOHN T. HASLAM, Esq., for the respondent.

The Commissioner determined a deficiency of $42,825.69 in income tax for 1937 (Docket No. 105004) and a deficiency of $26,290.93 in estate tax (Docket No. 105005). The issue for decision in the estate tax case is whether the estate is entitled to a deduction for a bequest to charity of a remainder interest. The issue in the income tax case is whether the estate is entitled to a deduction under section 162 of the Revenue Act of 1937 of capital gains allegedly permanently set aside for charitable purposes.

FINDINGS OF FACT.

Ozro M. Field died estate in Massachusetts on May 3, 1936. The returns in question were filed with the collector in Massachusetts. The petitioner is the duly authorized executor of the estate.

The decedent was survived by his widow, May L. Field, who was then sixty-seven years of age. They had no children. The decedent never had any children of his own, but he had adopted three children, Deborah, Elizabeth, and Robert, before the death of his first wife. They were never adopted by May. They survived the decedent. The two girls were each twenty-seven and married, and Robert nearly twenty-one in 1936. The husbands of the girls were fully able to support them.

The gross estate of the decedent, as determined by the Commissioner, amounted to $366,527.66, and included $52,718.75 of property held jointly by the decedent and his wife. The widow owned income-producing property worth about $104,000 immediately after the death of her husband. She also owned tangible personal property and a comfortable country home in Buckland, Massachusetts. Most of her property had been given to her by her husband.

The decedent provided in his will that his property should be held in trust; the net income was to be paid to his wife for life, with the right in the corporate trustee to pay from the principal any amount which it should "in its sole discretion deem wise and proper for the comfort, support, maintenance and/or happiness of my said wife, and it is my wish and will that . . . my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust"; $100,000 was to be held in trust after the death of the wife and the income from one-fourth paid to each of the three adopted children for life and to Dora L. Russell, a niece of May L. Field, for life; the remainder was to go to named charities upon the death of May; and, as

each life beneficiary of the $100,000 trust died, one-fourth of the principal was to go to named charities.

The Commissioner concedes that the charitable beneficiaries are corporations of such character as to render legacies to them deductible under both the estate and income tax laws. The parties are in agreement as to the value of the life estates.

The decedent and May had agreed that, since his wealth had come from the public patronage of Kennedy retail clothing stores, it would be appropriate to leave it to charities. They wrote wills simultaneously leaving the remainder interests in their estates to charities in which they were interested, hospitals.

The annual living expenses of the decedent and his wife just prior to his death had amounted to about $6,000. They lived simply but comfortably. They paid all of the expenses of Robert, who lived with a niece of May, and gave presents to Elizabeth and Deborah as suited their pleasure.

The annual living expenses of May after the death of her husband amounted to between $6,000 and $7,000. She never needed or received any of the principal of the trust and has no intention of ever asking for any.

Her total income from her own property and the trust, and the amount she has actually spent has been as follows:

Period	Income	Expenditures
1936 (7 months)	$10,735.35	$1,853.99
1937	24,738.57	10,357.91
1938	17,480.85	11,055.91
1939	17,448.23	12,024.92
1940	16,959.66	13,389.31
Total	87,362.66	48,682.04

The estate is holding uninvested about $41,000. The expenditures included Massachusetts inheritance tax of $2,518.46 paid in 1937, $855 for an automobile and later $1,435 for another, $2,250 for a mink coat, $1,600 for two trips, $700 in 1940 to help the niece when her husband died, $1,500 to help the niece's son complete

medical school, and an undisclosed amount for a fur coat for Deborah. May has given all of the help that she desired to give, including gifts to persons in any way related to herself or to the decedent, and has saved excess income of about $40,000 from 1936 through 1940, which she intends to hold for any special purpose which may arise.

The value of the trust estate at the close of 1940 was about $366,000 and that of the personal property of May was about $151,000.

The estate realized capital gains of $100,900.31 in 1937, $65,860 of which was from the sale of 2,000 shares of 7 per cent preferred stock of the Kennedy Co. May sold 176 shares of the same stock in 1937.

The Commissioner disallowed all of the deduction claimed on the estate tax return for charitable bequests and all of the deductions claimed on the income tax return under section 162. He explained that the right to invade the corpus for the benefit of the widow made it impossible to determine the amount of any bequest to charity.

Opinion.

Murdock: The estate tax law allows a deduction for the amount of all bequests or legacies to corporations organized for charitable purposes and the income tax law allows a similar deduction for any part of the gross income which is permanently set aside for such purposes. The remainder interest in the decedent's estate, including the amount realized from the sale of securities (the capital gains), was to go to charitable corporations, hospitals. The Commissioner contends, however, that no deduction is proper because the corpus could be invaded and it is impossible to determine how much might be used up by the widow. He does not suggest that the entire corpus might be used by her, yet he has allowed no deduction. He does not question the fact that the capital gains became a part of the corpus of the trust.

The corpus could be invaded only in case the trustee concluded, in the exercise of its discretion, that income was insufficient for

the "comfort, support, maintenance, and/or happiness" of the widow and the use of principal would be "wise and proper". Cases where the beneficiary was not restricted in any way and cases where annuities for after-born children might consume the corpus are not in point. *Cf. Mercantile Trust Co., Executor,* 13 B.T.A. 85; aff'd., 43 Fed. (2d) 39. The problem is similar to that involved in *Ithaca Trust Co.* v. *United States,* 279 U.S. 151. The income and such part of the principal as might be "necessary to suitably maintain" her "in as much comfort as she now enjoys" was to go to the life tenant and the remainder was to go to charity. The court said:

> . . . The case presents two questions, the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under section 403(a)(3), *supra,* in order to ascertain the estate tax cannot be allowed. . . . This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death the testator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs.

The same principles apply in an income tax case. *Helen G. Bonfils et al., Executors,* 40 B.T.A. 1079; *F. G. Bonfils, Trust,* 40 B.T.A. 1085; affd., 115 Fed. (2d) 788. The standard fixed by Field was also capable of being stated in fairly definite terms of money. The income of the estate at the death of the testator was more than sufficient to maintain the widow as required and there was no uncertainty as to future sufficiency appreciably greater than the general uncertainty that attends human affairs. There is evi-

dence of the amount of income which could be expected and of the probable expenditures of the widow. The former was about 1.8 times the latter. The actual living expenses of the widow were about one-third of the average income. There is evidence that the widow would be most reluctant to invade the corpus of the trust. The contention of the respondent that there was a "trend" of declining income and ascending expenditures is not borne out by the evidence. The income has been uniform in amount since the sale of the Kennedy 7 per cent preferred stock. The expenditures of the widow have increased somewhat as she found some new uses for a part of her excess income, but there is reason to believe that she will never want more than income from the trust. This may be a borderline case,[1] but the possibility of corpus being invaded is sufficiently remote to justify the deductions claimed.

Reviewed by the Board.

Decision will be entered under Rule 50.

BLACK, TURNER, KERN, and OPPER dissent.

[1] Income was about five times the amount needed for the annuities in the *Bonfils* case. The deduction was disallowed in *Boston Safe Deposit & Trust Co.* v. *Commissioner*, 26 B.T.A. 486; affd., 66 Fed. (2d) 179; certiorari denied, 290 U.S. 700, where income was only about 1.4 times the amount needed for annuities and there was a possibility that more annuitants would be born.

UNITED STATES BOARD OF TAX APPEALS.

Docket Nos. 105004, 105005.

Estate of Ozro Miller Field, The Merchants National Bank of Boston, Executor, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

DECISION.

Entered December 17, 1941.

The respondent, on December 13, 1941, filed a proposed computation pursuant to the Board's findings of fact and opinion pro-

mulgated October 7, 1941. The petitioner agrees with said computation and has noted his acquiescence thereon. Therefore, it is

Ordered and decided, that there is no deficiency in income tax for the year 1937 and that there is a deficiency in estate tax in the amount of $1,461.04.

Enter: J. E. MURDOCK, *Member.*

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

PETITION FOR REVIEW.

[Filed March 10, 1942.]

Guy T. Helvering, United States Commissioner of Internal Revenue, holding office by virtue of the laws of the United States, hereby petitions the United States Circuit Court of Appeals for the First Circuit to review the decision entered by the United States Board of Tax Appeals on December 17, 1941, that there is no deficiency in income tax for the year 1937 and that there is a deficiency in estate tax due from the Estate of Ozro Miller Field, deceased (date of death, May 3, 1936), only in the amount of $1,461.04. This petition for review is filed pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

The Merchants National Bank of Boston, with its principal place of business at 28 State Street, Boston, Massachusetts, is the executor of the will of Ozro Miller Field, the decedent herein. The income and estate tax returns made on behalf of the decedent's estate by the aforesaid executor, were filed with the Collector of Internal Revenue for the District of Massachusetts, whose office is located at Boston, Massachusetts, which is within the jurisdiction of the United States Circuit Court of Appeals for the First Circuit.

NATURE OF THE CONTROVERSY.

The nature of the controversy is as follows, to-wit:

The decedent, under the provisions of his will, placed his residuary estate in trust. The income from the trust corpus was directed

to be paid to the decedent's widow for life, with remainder to charitable organizations. The trustee of the trust estate was authorized to pay to the decedent's widow such sums from the principal of the trust fund as it should deem wise and proper for the comfort, support, maintenance and/or happiness of the widow, such authority to be liberally exercised, prior to the claims of residuary beneficiaries.

The trustee of the trust estate, in 1937, realized capital gains upon the sale of assets of the trust. In the income tax return of the estate for that year, the executor claimed a deduction from gross income of the amount of the capital gains as income permanently set aside for charity; and in the estate tax return filed on behalf of the decedent's estate, the executor claimed a deduction in the amount of the value of the remainder interest in the trust corpus as a bequest to charitable organizations.

In determining deficiencies in the income and estate tax liability of the estate, the Commissioner disallowed the claimed deductions because the right to invade the trust corpus made it impossible to determine the amount of the value of the trust corpus, if any, that would eventually pass to charity.

The two cases were consolidated for hearing before the Board of Tax Appeals and a single opinion was promulgated, and a single decision was entered. The findings of fact and opinion of the Board was promulgated October 7, 1941, in which the Board erroneously held and decided that the estate was entitled to the claimed deductions; and the final order of redetermination of the deficiencies was entered on December 17, 1941, in which the Board erroneously decided that there was no deficiency in the income tax for the year 1937, and that there was a deficiency in the estate tax only in the amount of $1,461.04.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
J. P. WENCHEL, RLW,
Chief Counsel, Bureau of Internal Revenue,
Attorneys for Petitioner on Review.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

NOTICE OF FILING PETITION FOR REVIEW.

[Filed March 13, 1942.]

To EDWARD C. THAYER, Esq., 53 State Street, Boston, Massachusetts.

You are hereby notified that the Commissioner of Internal Revenue did, on the tenth day of March, 1942, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit, of the decision of the Board heretofore rendered in the above-entitled causes. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this tenth day of March, 1942.

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this twelfth day of March, 1942.

EDWARD C. THAYER,
Attorney for Respondent on Review.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

NOTICE OF FILING PETITION FOR REVIEW.

[Filed March 21, 1942.]

To THE MERCHANTS NATIONAL BANK OF BOSTON, Exec., Estate of Ozro Miller Field, 28 State Street, Boston, Massachusetts.

You are hereby notified that the Commissioner of Internal Revenue did, on the tenth day of March, 1942, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals

for the First Circuit, of the decision of the Board heretofore rendered in the above-entitled cause. A copy of the petition for review as filed is hereto attached and served upon you.

Dated this tenth day of March, 1942.

J. P. WENCHEL, RLW,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review, is hereby acknowledged this fourteenth day of March, 1942.

THE MERCHANTS NATIONAL BANK OF BOSTON, *Exec.,*
Estate of OZRO MILLER FIELD,
by A. H. WAITE, *Asst. Trust Officer,*
Respondent on Review.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

STATEMENT OF POINTS TO BE RELIED ON BY PETITIONER ON REVIEW.

[Filed May 21, 1942.]

Now comes Guy T. Helvering, Commissioner of Internal Revenue, the petitioner on review herein, by and through his attorneys, Samuel O. Clark, Jr., Assistant Attorney General, and J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and hereby asserts the following errors on which he intends to rely in this review:

1. The Board of Tax Appeals erred in holding and deciding that the estate is entitled to a deduction from gross income of the amount of capital gains upon sale of assets of the residuary trust estate as permanently set aside for charitable purposes.

2. The Board of Tax Appeals erred in not holding and deciding that the estate is not entitled to a deduction from gross income of capital gains realized upon sale of assets of the trust estate set up under the decedent's will.

3. The Board of Tax Appeals erred in holding and deciding that the estate is entitled to a deduction from the decedent's gross estate of the amount of the value of the remainder interest in the residuary trust estate created under the decedent's will, as a bequest to charitable organizations.

4. The Board of Tax Appeals erred in not holding and deciding that the estate is not entitled to a deduction from the decedent's gross estate of the amount of the value of the remainder interest in the residuary trust estate created under the decedent's will, as a bequest to charitable organizations.

5. The Board of Tax Appeals erred in entering its order of redetermination that there is no deficiency in income tax for the year 1937, and that there is a deficiency in estate tax in the amount of $1,461.04.

6. The Board of Tax Appeals erred in failing and refusing to enter its order of redetermination that there are deficiencies in income tax and estate tax due from the decedent's estate in the respective amounts asserted by the Commissioner.

SAMUEL O. CLARK, JR.,
Assistant Attorney General,

J. P. WENCHEL, RLW,
Chief Counsel, Bureau of Internal Revenue.

Copy of this statement of points was mailed to Edward C. Thayer, Esq., 53 State Street, Boston, Massachusetts, attorney for respondent on review, this day, May twentieth, 1942.

RALPH F. STAUBLY,
Special Attorney, Bureau of Internal Revenue.

OFFICIAL REPORT OF PROCEEDINGS BEFORE THE UNITED STATES BOARD OF TAX APPEALS.

[Filed March 14, 1941.]

Docket Nos. 105004–5.

Estate of Ozro Miller Field, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

Hearing at Boston, Mass., February 26, 1941.

[Titles omitted.]

Court Room No. 5, Federal Building,
Boston, Massachusetts, February 26, 1941.

[Met pursuant to notice at 10:00 A.M.]

Before: J. EDGAR MURDOCK, Member.

Appearances:

EDWARD C. THAYER, Esq., for the Estate of Ozro Miller Field, the petitioner.

JOHN T. HASLAM, Esq., for the Commissioner of Internal Revenue, respondent.

* * * * *

ALBERT H. WAITE, called as a witness in behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk. Give the reporter your name?

The Witness. Albert H. Waite.

Direct Examination.

Q. 1 (by Mr. Thayer). Your name is Albert H. Waite? *A.* Yes.

Q. 2. What is your position with the Merchants National Bank of Boston? *A.* Assistant trust officer.

Q. 3. And as such, what are your duties? *A.* The administration of estates and trusts come under my supervision.

Q. 4. With reference to the Field estate and the trust under the Field will, will you state whether or not that is directly under your supervision? *A.* It is.

Q. 5. And have you also had supervision of Mrs. Field's agency account at the bank? *A.* Yes.

Q. 6. And are you the person who consults with Mrs. Field when she comes to the bank in regard to her affairs? *A.* Yes.

Q. 7. And the records of the department come under your supervision? *A.* Yes.

Q. 8. Mr. Waite, at my request did you have one of your associates, Mr. Linden, prepare, from the records in the bank, and from letters concerning savings bank accounts, and a letter concerning the account in the Franklin County Trust Company of Greenfield—did you cause to be prepared certain computations which I outline, designed to show the income available to Mrs. Field in every year, and also to show the status of her capital and the capital in the estate and trust, and also to show the maximum expenditures not accounted for by investment, which have been made by her since the death of Mr. Field? *A.* I did.

Mr. Thayer. I would like to offer this in evidence.

Q. 9 (by Mr. Thayer). Are these the computations which you caused to be made? *A.* Yes.

Mr. Thayer. I would like to offer in evidence three schedules. I will call them, one entitled, "May L. Field Annual Income, May 3rd to December 31st, 1940", which I would like to have marked Exhibit A or 1, if your Honor please.

The Member. If there is no objection they are admitted.

Mr. Haslam. There is no objection to the admission.

[The schedule referred to was received in evidence and marked Petitioner's Exhibit 1.]

Mr. Thayer. Two, a schedule entitled, "Capital, May L. Field, and Estate and Trust also of May L. Field, May 3, 1936–December 31, 1940", which I would like to have marked Exhibit No. 2.

Mr. Haslam. No objection.

[The schedule referred to was received in evidence and marked Petitioner's Exhibit 2.]

Mr. Thayer. And thirdly, the schedule entitled "Expenditures of May L. Field, May 3, 1936 to December 31, 1940". Would your Honor like to have those submitted in duplicate or a copy of them given to you at this point?

The Member. No, duplicates are not necessary unless—

Mr. Thayer. I have plenty of them.

The Member. —unless you want to put them in so that if on appeal you wanted to save expense of having copies made, you would have them in the record.

Mr. Thayer. I have plenty of them, so I will give them to your Honor, so you can follow them.

[The schedule above referred to was received in evidence and marked Petitioner's Exhibit 3.]

Mr. Thayer. Mr. Haslam suggests that I make a statement of the purpose for which these are offered, your Honor. The primary purpose is to show what the record of the estate and trust and of Mrs. Field shows in income expenditures and increases in capital on a consolidated basis. I think there is no question of materiality of the situation at Mr. Field's death so far as the estate tax is concerned or showing the situation in the year 1937, which is concerned in the income tax case, but I also submit that they are admissible as respects the subsequent years to date, as confirmatory of the situation which might have been envisaged at that time as to be anticipated for those years.

Mr. Haslam. That is satisfactory.

Q. 10 (by Mr. Thayer). Mr. Waite, has Mrs. Field ever asked you or the bank to make her any advances or payments from the principal of the estate of the trust? *A.* No.

Q. 11. Did you have a conference with Mrs. Field before any tax returns had been filed, a conversation, I think in and about February of 1937 in regard to the adequacy of her resources? *A.* I recall having some conversation. The exact date has slipped my mind.

Mr. Thayer. Have you any objection to my showing Mr. Waite an affidavit which he made?

Mr. Haslam. No.

The Witness. I remember that.

Q. 12 (by Mr. Thayer). You remember such a conference? *A.* Yes.

Q. 13. Will you tell us the substance of that conference, Mr. Waite? *A.* As I recall it, I discussed with Mrs. Field the taxability of the charitable remainders or non-taxability. I made a memorandum at the time. I can't definitely say from memory.

Q. 14. Just a minute. I think I have that, too. [Hands paper to witness.] *A.* Yes, this is the memorandum.

Q. 15. Refresh your recollection from that and tell us what that conference was, Mr. Waite? *A.* That was about the time Mrs. Field received the proceeds of the sale of her Kennedy stock, and she was discussing with me what to do with the proceeds. It was pointed out that she could invest it in stocks and bonds or put it in a savings account, and in as much as she already had a large number of deposits in the savings account, stress was laid on stocks and bonds at this point. As I recall it, as a result of that conference, Mrs. Field opened a so-called investment management or agency account with our trust department, with the sum of $19,000.

Q 16. What, if anything, did she say to you then about the adequacy of her income for her purposes? *A.* When the lower yield of savings bank interest was mentioned, she said that—I may not be able to correctly quote her, but to the effect, at least, that she had adequate income for her needs and was not particularly interested in receiving more income from securities, if invested in securities, but nevertheless she decided to invest in those securities under our management.

Mr. Thayer. I don't think I have any more questions.

Mr. Haslam. No questions.

Mr. Thayer. I would like to offer a certified copy of the will.

The Member. No objection?

Mr. Haslam. No objection.

The Member. Admitted.

Mr. Thayer. That will be marked Exhibit 4.

[The document referred to was received in evidence and marked Petitioner's Exhibit 4.]

Mr. Thayer. I would like to offer certificates of the appointment of the Merchants National Bank as executor and trustee under the will.

Mr. Haslam. No objection.

The Member. Petitioner's Exhibit 5, and 6.

[The documents referred to were received in evidence and marked Petitioner's Exhibit 5, and 6.]

Mr. Thayer. I would like to offer certified copies of the decrees of the Probate Court of Essex County showing the adoption of three children by Mr. Ozro Field and his former wife, Grace Lewis Field.

Mr. Haslam. No objection.

The Member. Admitted.

[The documents referred to were received in evidence and marked Petitioner's Exhibits 7, 8 and 9.]

Mr. Thayer. Now, Mrs. Field, will you take the stand, please?

MAY L. FIELD, called as a witness in behalf of the petitioner, having been first duly sworn, was examined and testified, as follows:

Direct Examination.

Q. 1 (by Mr. Thayer). Will you give the reporter your name, please? *A.* May L. Field.

Q. 2. And you are the widow of the late Ozro Miller Field? *A.* Yes.

Q. 3. Where do you live, Mrs. Field? *A.* Buckland, Massachusetts.

Q. 4. What was your age at the time of Mr. Field's death in May, 1936? *A.* Sixty-seven.

Q. 5. When were you and Mr. Field married? *A.* September 9th, 1919.

Q. 6. Mr. Field had been married before? *A.* Yes.

Q. 7. Did you and Mr. Field have any children? *A.* No.

Q. 8. Did Mr. Field have any children by his first marriage? *A.* No.

Q. 9. Did you, yourself, adopt the three children who had been adopted by Mr. Field and his first wife? *A.* No.

Q. 10. At the time of Mr. Field's death, will you tell me how old these children were, or how they were situated in life? *A.* Deborah was 27; Elizabeth, 27; and Robert not quite 21.

Q. 11. Were the girls married? *A.* Yes.

Q. 12. Were their husbands capable of supporting them? *A.* Yes.

Q. 13. Where was Robert living at the time? *A.* With my niece.

Q. 14. With your niece? *A.* In Peabody.

Q. 15. Where were you and Mr. Field living? *A.* In an apartment in Beverly and in the country.

Q. 16. And a country estate in Buckland? *A.* Yes.

Q. 17. Mr. Field had given you that estate? *A.* Yes.

Q. 18. Do you know how much it cost? *A.* Three thousand.

Q. 19. Is this a photo of it, Mrs. Field? *A.* Yes.

Mr. Thayer. I offer this in evidence.

The Member. It is admitted.

[The photograph referred to was received in evidence and marked Petitioner's Exhibit 10.]

Q. 20 (by Mr. Thayer). Can you estimate for us, Mrs. Field, about how much it cost you and Mr. Field to live a year when you were living in the apartment in Beverly before Mr. Field's death? *A.* I think our own expenses, about $6,000, I think.

Q. 21. To what extent were you, at that time, at the time of Mr. Field's death, making provisions for his adopted children? *A.* Well, Robert, we paid all his expenses and his board, and the other children, we gave as they needed it.

Q. 22. Substantial amounts? *A.* Sometimes. Well, I can't tell

how much it amounted to, but we used to give as they needed things.

Q. 23. You gave them things as they needed them? *A.* Yes.

Q. 24. Was the mode of life you were living prior to Mr. Field's death comfortable and satisfactory to you, Mrs. Field? *A.* Very comfortable.

Q. 25. Mr. Field, from time to time gave you money or securities? *A.* Yes.

Q. 26. These securities, Mrs. Field, General Motors, 27, United Fruit Company, American Telephone—how many shares of that did you have before his death? *A.* Sixty.

Q. 27. And 176 shares of Kennedy Company? *A.* That is right.

Q. 28. Were these stocks he had given you? *A.* Some of it, I bought myself.

Q. 29. And you had bank accounts at that time? *A.* Yes.

Q. 30. And you were called to the sale of—and do you recall the sale of the Kennedy stock, and placing the proceeds in the Merchants Bank, which Mr. Waite testified to? *A.* Yes.

Q. 31. Since Mr. Field's death, where have you lived? *A.* For the first year at the Hawthorne and Vendome, and my country place and—

Q. 32. The Hawthorne and Vendome are first class residential hotels? *A.* It was called so, and I like it.

Q. 33. It passed for that? *A.* Yes.

Q. 34. You moved from one to the other? *A.* Yes.

Q. 35. At my request, Mrs. Field, have you given some thought to estimating how much your ordinary living expenditures have been annually since Mr. Field's death? *A.* Well, just my personal expenses, between six and seven thousand—about six thousand—over that, probably.

Q. 36. Over six thousand? *A.* Yes.

Q. 37. You don't keep a book of expenses? *A.* Mr. Waite has all of it.

Q. 38. You have some notes on the subject, and you have con-

sidered that in preparing yourself to answer this question? *A.* Yes.

Q. 39. Now, when you say six or seven thousand dollars a year, as ordinary living expenses, you don't include taxes that you paid or any non-recurring expenses? *A.* No, large amounts like traveling, for instance, trips, some special account—

Q. 40. Or gifts to people? *A.* Gifts and automobiles, and things like that.

Q. 41. But you did mean to include your ordinary costs in living? *A.* Yes.

Q. 42. Will you consider now some note of some of the expenditures you have made since Mr. Field's death of this exceptional character, that wouldn't be included in the six thousand dollars a year? *A.* Well, there would be two automobiles, one a Ford. It is something like 855, and the second one was a LaSalle, which was $1435, I think, and then—

Q. 43. Any coats? *A.* Yes, the one I have on.

Q. 44. What did that cost? *A.* This one I think was $2250. I think that was the cost of it. And Robert, I paid his expenses, were about $1500.

Q. 45. Robert is who? *A.* Robert isn't my adopted child but Mr Field's adopted boy.

Q. 46. Now, how about Deborah L. Russell? *A.* She had trouble last year. Her husband died from an unknown disease, and I gave her seven hundred to pay a hospital bill.

Q. 47. And her children, she has a boy and girl? *A.* One son. I have helped put through medical school in New York.

Q. 48. What has that cost you? *A.* About $1500, I think.

Q. 49. He is now an interne? *A.* Just made an interne at Bellevue.

Q. 50. And as to the girls, Mrs. Field. *A.* The girls, I give them their extra clothing that they can't quite afford to have. I gave Deborah a fur coat this winter, and Elizabeth's little girl, I kept in good clothing, and the other little girl. They have two children.

Q. 51. Have you been able to do whatever you wanted to do for your relatives within the amounts you have spent? *A.* Yes, I have. Mr. Field's brother, I have helped a little bit.

Q. 52. Now, on particular travel trips. Have you taken any trips for your enjoyment? *A.* I went to Nassau and Bermuda.

Q. 53. What did those trips cost? *A.* About eight hundred apiece, I think.

Q. 54. Have you any unusual medical expenses, Mrs. Field? *A.* Yes, I had about five hundred, I think, dental bills in four years, an infection, and then I had pneumonia, and I was also at the Phillips House of the Massachusetts General Hospital of Boston.

Q. 55. And these expenditures are in addition to the six thousand living expenses you testified to? *A.* Yes.

Q. 56. When Mr. Field made the will in evidence, which is dated December, 1935, did you also make a will? *A.* At the same time.

Q. 57. Did you have any talk with Mr. Field on the subject of the disposition of your respective properties? *A.* Well, yes, over my house in Buckland chiefly.

Q. 58. Did he say anything about his intention with regard to charitable gifts? *A.* Yes, he always contended that his money was first made—that was his start with Mr. Kennedy. Mr. Kennedy and Mr. Field in Beverly—that was the first store they opened after Hyde Park, that was where they obtained their start, and Mr. Field always claimed that part of his money came from the public there and should go back to the public as much as possible. Also Dr. Johnson, who has built up that hospital was our family doctor, so that was why he wanted eventually all the money would go to this, and also he has four cases of cancer in his family, and also my sister died of cancer, and that is the reason everything goes to those hospitals.

Q. 59. Did you make your will at the same time, leaving your estate to charity? *A.* Mine goes to charity also.

Q. 60. You also made a subsequent will which goes in trust to

these children, but subsequent to that, all goes to charity? *A.* All goes to charity.

Q. 61. Do you know whether or not you have been able to live and make all your expenditures well within the income which has been available to you? *A.* Yes.

Q. 62. Have you any idea how much you have been able to accumulate? *A.* Aside from what I spent?

Q. 63. Yes. *A.* Yes, I think about $44,000.

Q. 64. In savings bank accounts? *A.* Sixteen, I think, in bank accounts, and then I already had, I think something like—well, in all, I think it amounted to $44,000. And then my checking accounts, two checking accounts.

Q. 65. Your checking account at the Merchants, have you any idea how much that has increased? *A.* $23,000, a little over. Greenfield Trust, I think, $5,000.

Q. 66. Have you ever asked Mr. Waite for any of the principal of your husband's estate? *A.* No, I have not.

Q. 67. Or asked anybody else for it? *A.* No.

Q. 68. Is it your present intention to ask for any money from that estate? *A.* No.

Mr. Thayer. I think that is all.

* * * * *

722 ADMITTED IN EVIDENCE - PEP'S EX. 4. 2/20/41

MAY L. FIELD - ANNUAL INCOME — May 3, 1936 to December 31, 1940

Exhibit 4

		1936 5/3 to 12/31		1937		1938		1939		1940	
Estate Geo H. Field											
Net Income Received		9 035.96		17 093.52		3 587.50		3 360.00		1 985.54	
Less: Executors Compensation (estimated)	554.40		1 037.70		213.15		801.60		174.90		
Mass. tax (paid in subsequent year)	567.99		1 081.20		195.45		174.24		164.10		
Federal tax (paid in subsequent year)	323.84	1 445.83	1 358.38	3 477.88	56.79	465.39	78.50	454.34	[illegible]	339.00	
Income available for May L. Field		7 590.33		13 616.30		3 068.11		2 905.66		1 586.54	28 760.94 (a)
(Actually distributed)		(2 000.00)		(5 000.00)		(10 000.00)		(5 000.00)		(3 000.00)	(29 000.00)
Trust w/v Geo H. Field											
Net Income Received				5 709.06		10 350.90		10 143.98		10 947.75	
Less: Trustees Compensation (estimated)			436.58		661.17		871.65		705.94		
Mass. tax (paid in subsequent year)			337.71	774.29	689.83	1 891.00	588.87	1 269.98	587.56	1 891.50	
Income available for May L. Field				4 934.77		8 459.90		8 874.06		9 696.25	32 584.98 (b)
(Actually distributed)				(4 [illegible].00)		(9 180.00)		(8 800.00)		(9 460.00)	(31 850.00)
May L. Field - Agency Account											
Income received				483.39		837.09		801.19		831.56	2 893.23 (c)
Income from May L. Field - Personal Holdings		2 853.85		5 841.00		3 981.00		4 148.00		4 173.00	20 336.85 (d)
Income from May L. Field - Savings Accounts		891.77		583.11		600.75		719.38		718.31	3 847.26 (e)
		10 735.95		24 758.57		17 480.85		17 448.85		16 959.66	87 368.66

Footnotes
(a) Source, Income Account, Merchants National Bank as Executor
(b) " " " " " " " " Trustee
(c) " " " " " " " " Agent
(d) Taken from Standard Statistics on securities stated to be owned by Mrs. Field except for dividends of $534 paid in 1937 and $1,068 on 178 shares of Kennedy Co. sold on February 20, 1937
(e) As shown on Savings Bank Books and confirmed by letters from the Savings Banks

CAPITAL

73 Pet'n Exh. Admitted in Evidence 2/26/41

MAY L. FIELD AND ESTATE AND TRUST OSRO M. FIELD MAY 3, 1936 - DECEMBER 31, 1940

Exhibit 2

	1936 May 3	1937 January 1	1938 January 1	1939 January 1	1940 January 1	1940 December 31
Agency Account (a)			18 962.35	18 949.08	18 961.34	18 910.95
Personal Holdings:						
100 Shs. General Motors Corp. Common @ 61½ (b)	6 150.00	6 150.00	6 150.00	6 150.00	6 150.00	6 150.00
27 Shs. United Fruit Co. Capital @ 70 (b)	1 890.00	1 890.00	1 890.00	1 890.00	1 890.00	1 890.00
410 Shs. American Telephone & Telegraph Co. Capital @ 150 5/8 (d)	61 756.25	61 756.25	61 756.25	61 756.25	61 756.25	61 756.25
178 Shs. Kennedy Co. Pfd. @ 90 (d)	16 020.00	16 020.00				
Savings Bank Deposits (e)	18 608.35	18 575.11	22 483.69	29 088.83	33 306.85	34 443.22
Checking Accounts:						
Merchants National Bank of Boston (f)	2 492.19	5 480.99	7 938.80	18 196.37	21 061.96	23 852.64
Franklin County Trust Co. of Greenfield Mass. (g)			1 870.30	1 785.30	1 717.31	4 976.11
TOTAL PERSONAL ASSETS	106 926.79	109 872.35	180 391.39	137 755.83	144 843.71	151 379.17
Estate Account (h)	879 764.79	878 750.45	111 755.87	99 313.83	99 313.83	95 589.19
Trust Account (i)			259 999.55	268 836.50	269 330.70	270 457.14
TOTAL FIDUCIARY CAPITAL	879 764.79	878 750.45	371 754.82	368 151.73	368 643.93	366 046.33
TOTAL	986 691.58	988 622.80	492 146.21	505 907.56	513 487.64	517 425.50

Footnotes
(a) Source, Capital Account of Merchants National Bank of Boston as Agent at book value
(b) Valuation of similar securities owned by decedent as returned by the taxpayer for Estate tax purposes as of May 3, 1936 and not disputed by the Commissioner of Internal Revenue
(c) Source, The Commercial & Financial Chronicle, Vol. 142, Part 2, for May 2, 1936 and May 4, 1936
(d) Valuation of similar securities owned by decedent as of May 3, 1936 as determined by the Commissioner of Internal Revenue for purposes of estate tax and not disputed by the taxpayer (350 shares of the American Telephone & Telegraph stock were jointly held by Mr. and Mrs. Field)
(b),(c), (d) On February 24, 1941, these securities closed as follows: General Motors @ 42 7/8, United Fruit @ 65, American Tel. & Tel. @ 160 3/4 (Mrs. Field sold her Kennedy stock on February 20, 1937)
(e) Source, savings bank books, confirmed by letters from the respective banks
(f) Source, records of The Merchants National Bank of Boston (This account was started by a deposit of $2,492.19 on June 3, 1936)
(g) Source, letter from Franklin County Trust Co., Greenfield, Mass.
(h) Source, Capital Account of The Merchants National Bank of Boston as Executor at book value
(i) Source, Capital Account of The Merchants National Bank of Boston as Trustee at book value

49

ADMITTED IN EVIDENCE - PETITIONER'S EXHIBIT 3
2/28/41

Exhibit 3

EXPENDITURES OF MAY L. FIELD MAY 5, 1936 to DECEMBER 31, 1940

	1936		1937		1938		1939		1940	
Merchants National Bank										
Opening Checking Account Balance	2 492.19		5 480.99		7 938.80		18 196.37		21 061.96	
(a) Deposits	4 842.79		37 084.08		28 042.87		18 822.52		20 838.79	
Franklin County Trust Co.										
Opening Checking Account Balance					1 270.30		1 785.30		1 717.31	
TOTAL		7 334.98		42 567.01		37 251.97		38 804.19		43 618.06
Closing Franklin Checking Account Balance			1 270.30		1 785.30		1,717.31		4 976.11	
Closing Merchants Checking Account Balance	5 480.99		7 938.80		18 196.37		21 061.96		23 252.64	
Deposits in Savings Banks	None		4 000.00		6 214.39		4 000.00		2 000.00	
Paid to Merchants National Bank Agency Account			19 000.00							
TOTAL		5 480.99		32 209.10		26 196.06		26 779.27		30 228.75
(b) DIFFERENCE		1 853.99		10 357.91		11 055.91		12 024.92		13 389.31

FOOTNOTES (a) All the income Mrs. Field receives is paid into her checking account with The Merchants National Bank. She draws on this account to maintain her balance with The Franklin County Trust Co., but no deposits are made in The Franklin account except by check on The Merchants National.

(b) Total expenditures (maximum) $48,684.04

PETITIONER'S EXHIBIT 4.

Be It Remembered that I, Ozro M. Field, of Beverly in the County of Essex and Commonwealth of Massachusetts, being of sound and disposing mind and memory, but realizing the uncertainty of this life, do make, publish and declare this my last Will and Testament, hereby revoking any and all Wills by me at any time heretofore made.

First. I direct my Executor hereinafter named to pay, as soon as may be after my death, all of my just debts, funeral expenses and charges of administration.

Second. I give and bequeath to my wife, May L. Field, if she shall be living at the time of my decease, all of my household furniture and furnishings, books, pictures, silverware, china, rugs, household supplies and other articles of household use, jewelry, clothing and wearing apparel, and automobiles and their appurtenances, garage equipment and supplies, owned by me at the time of my decease.

Third. If my said wife, May L. Field, shall be living at the time of my decease, then and in that case I give, devise and bequeath all of the rest, residue and remainder of my estate, real, personal and mixed, of every kind, nature and description, wheresoever the same may be situated, located or found, whether within this Commonwealth or without, of which I shall die seized and possessed or to which I shall be entitled at the time of my decease, or over which I then have any power of appointment or disposal whatsoever, to The Merchants National Bank of Boston, a banking corporation having a usual place of business at Boston, Massachusetts, In Trust, Nevertheless, for the following uses and purposes, to wit:—To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarterannually, or oftener in the discretion of my said Trustee, to my said wife, May L. Field, during the term of her natural life.

My said Trustee shall also have the right to pay to, or for the benefit of my said wife, May L. Field, such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust.

Upon the death of my said wife, May L. Field, she dying after me, my said Trustee shall retain the sum of One Hundred Thousand Dollars ($100,000) and hold the same In Trust for the following uses and purposes, to wit: To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarter-annually, or oftener in the discretion of my said Trustee, as follows:—one-quarter to my adopted daughter, Deborah Jensen, now of Beverly, Massachusetts, during the term of her natural life; one-quarter to my adopted daughter, Elizabeth Harnden, now of Brookline, Massachusetts, during the term of her natural life; one-quarter to my adopted son, Robert M. Field, now of Peabody, Massachusetts, during the term of his natural life; and one-quarter to Dora L. Russell, niece of my said wife, now of Peabody, Massachusetts, during the term of the natural life of said Dora L. Russell. As and when each of the last four above-named beneficiaries shall decease, I direct my said Trustee to pay the income to which he or she would have been entitled if he or she had lived, in equal shares to Beverly Hospital Corporation, of Beverly, Massachusetts, and The Palmer Memorial Unit of New England Deaconess Hospital, now located at 195 Pilgrim Road in Boston, Massachusetts, until the last survivor of the said Deborah Jensen, Elizabeth Harnden, Robert M. Field and

Dora L. Russell shall have deceased, and upon the death of the last survivor of them, I direct my said Trustee to pay over and distribute the whole corpus or principal of this One Hundred Thousand Dollar Trust Fund, together with accumulated income, in equal shares, to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust.

The balance or remainder of the corpus or principal of the trust estate after the death of my said wife, she dying after me, I direct my said Trustee to pay over and distribute in equal shares to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust.

Fourth. If my said wife, May L. Field, shall predecease me, then and in that case I give and bequeath to said The Merchants National Bank of Boston the sum of One Hundred Thousand Dollars ($100,000), In Trust, Nevertheless, for the following uses and purposes, to wit:—To hold, manage, control, invest and reinvest the same, or any part thereof, as to my said Trustee may seem advantageous, and after deducting all expenses properly chargeable to income, to pay the net income derived therefrom quarterannually, or oftener in the discretion of my said Trustee, as follows:—one-quarter to my said adopted daughter, Deborah Jensen, during the term of her natural life; one-quarter to my said adopted daughter, Elizabeth Harnden, during the term of her natural life; one-quarter to my said adopted son, Robert M. Field, during the term of his natural life; and one-quarter to said Dora L. Russell, during the term of her natural life. As and when each of the last four above-named beneficiaries shall decease, I direct my said Trustee to pay the income to which he or she would have been entitled if he or she had lived, in equal shares to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, until the last survivor of the said Deborah Jensen, Elizabeth Harnden, Robert M. Field and Dora L. Russell shall have deceased, and upon the death of the

last survivor of them, I direct my said Trustee to pay over and distribute the whole corpus or principal of this One Hundred Thousand Dollar Trust Fund, together with accumulated income, in equal shares, to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital, free and discharged of this trust.

Fifth. All of the rest, residue and remainder of my estate, real, personal and mixed, of every kind, nature and description, wheresoever the same may be situated, located or found, whether within this Commonwealth or without, of which I shall die seized and possessed or to which I shall be entitled at the time of my decease, or over which I then have any power of appointment or disposal whatsoever, my said wife, May L. Field, predeceasing me, I give, devise and bequeath in equal shares to said Beverly Hospital Corporation and said The Palmer Memorial Unit of New England Deaconess Hospital.

Sixth. If payments of income or principal under any trust in this Will created are to be made to a person, who, in the opinion of my Trustee, is not competent or able to handle funds properly and carefully, then my Trustee may, in its discretion, make such payments in whole or in part for one or more of the following purposes:—

(a) Direct to said beneficiary;
(b) To the natural or legal guardian or conservator of such person;
(c) Expend the same for the said beneficiary's comfort, support, education and/or happiness.

Seventh. My Trustee shall have full power and authority to manage, control, invest and reinvest any and all of the property and estate of every kind and nature in this Will devised and bequeathed to it as Trustee, and I hereby authorize and empower my said Trustee to sell at any time the whole or any part of any of the trust property held by it under this Will as it in its judgment and discretion shall deem for the best interests of the trust estate,

with full power and authority to execute, acknowledge and deliver such deeds and instruments as may be necessary to pass title thereto, and no purchaser shall be required to see to the application of the purchase money.

Eighth. I hereby authorize and empower my said Trustee to hold or retain in the trust fund or funds any securities or other property belonging to me at the time of my decease as it in its judgment and discretion shall deem proper. It may also participate in any reorganization, merger or consolidation of any corporation whose stock, bonds or other evidences of indebtedness constitute a part of the trust estate.

Ninth. In addition to and not in limitation of all common law and statutory powers my said Trustee, or its successor or successors in trust, in relation to the trust funds shall have power to pledge, mortgage, to lease with or without option to purchase, to sell in whole or in part, at public or private sale without approval of any court, to exchange property for other property, to retain securities or properties received from the Executor, although of a kind or in an amount which would ordinarily be considered as not suitable for a trust investment, and to keep any or all securities or other properties in its own name without disclosing its trust capacity, or in the name of some other person with a Power of Attorney for their transfer attached; it may decide whether accretions to the trust property shall be treated as principal or income and whether expenses shall be charged to principal or income; to decide whether or not to make deductions for depreciation, obsolescence, amortization or waste and to compromise any doubtful claim, to make payments of principal or income to minors as though they were of full age, to expend for the comfort, education and happiness of minor beneficiaries the income due them or to pay the same to their natural or legal guardians. All such decisions made by my Trustee in good faith shall be conclusive upon all parties interested.

Tenth. Whenever it becomes necessary to divide the trust estate

for the purpose of distribution or otherwise, my Trustee may make division without formal appraisals or sales.

Eleventh. The income or principal of the trust funds shall not be assignable and cannot be anticipated or alienated in any manner by the beneficiaries, and is not to be subject to claims of creditors of any beneficiary nor subject to bankruptcy proceedings or any process of law.

Twelfth. My Said Trustee shall only be liable for its own wilful misconduct of gross negligence.

Thirteenth. I direct that all inheritance, legacy or succession taxes upon any of the foregoing bequests or devises in this Will shall be paid by my Executor as a part of the expenses of administering my estate.

Fourteenth. If any legatee or beneficiary under this Will shall contest the validity of this Will, I direct that any bequest or devise to or for the benefit of such legatee or beneficiary so contesting shall not take effect and that no property, real or personal, shall pass to such contesting legatee or beneficiary under this Will.

Fifteenth. Any bequest made under this Will cannot be anticipated or alienated in any manner by any legatee and is not to be subject to any claims of creditors of any legatee nor subject to bankruptcy proceedings or any process of law.

Sixteenth. I hereby nominate and appoint said The Merchants National Bank of Boston Executor of this my last Will and Testament, and I request and direct that it be exempt from giving any surety or sureties upon its official bond either as Executor or as Trustee under this Will.

Seventeenth. I hereby authorize and empower my said Executor to sell and dispose of any property, real or personal, left by me at the time of my decease, and to convey the same by such instruments as may be necessary to transfer title thereto, and no purchaser shall be required to see to the application of the purchase money.

In Witness Whereof I hereunto set my hand and seal and publish and declare this to be my last Will and Testament in the

presence of three witnesses whose names are hereunto subscribed this ninth day of December in the year of our Lord one thousand nine hundred and thirty-five. OZRO M. FIELD [SEAL]

Signed, sealed, published and declared as and for his last Will and Testament by the said Ozro M. Field in the presence of us, who, at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

Rutherford E. Smith
Frederick C. Allen
Grace M. Littlewood

Will proved June 2, 1936.

ESSEX, *ss.* PROBATE OFFICE. June 8, 1936

A true copy of record.

[SEAL] Attest: NATHAN A. FOWLER, *Asst. Register.*

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

DESIGNATION FOR RECORD ON REVIEW.

[Filed May 21, 1942.]

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the clerk of the United States Circuit Court of Appeals for the First Circuit, copies duly certified as correct of the following documents and records in the above-entitled causes in connection with the petition for review by the said Circuit Court of Appeals for the First Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board in each cause.

2. Pleadings before the Board:

(a) Petition in each cause, including annexed copy of deficiency letter.

(b) Answer in each cause.

3. Findings of fact and opinion, and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Testimony of witnesses Albert H. Waite and Mary [*sic*] A. Field, lines 21 to 24, inclusive, page 9, pages 10 to 25, inclusive, and lines 1 to 15, inclusive, page 26 of the official report of proceedings before the board, together with Exhibits 1 to 4, inclusive, but excluding Exhibits 5 to 10, inclusive.

6. Statement of points filed by petitioner on review.

7. This designation for record on review.

J. P. WENCHEL, w,
Chief Counsel, Bureau of Internal Revenue.

Copy of this designation for record on review was mailed to Edward C. Thayer, Esq., 53 State Street, Boston, Massachusetts, attorney for respondent on review, this date, May 20, 1942.

RALPH F. STAUBLY,
Special Attorney, Bureau of Internal Revenue.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD TO BE CONTAINED IN THE PRINTED RECORD ON REVIEW.

[Filed May 29, 1942.]

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the clerk of the United States Circuit Court of Appeals for the First Circuit copies duly certified as correct of the following documents and records in the above-entitled causes in connection with the petition for review by the said Circuit Court of Appeals for the First Circuit heretofore filed by the Commissioner of Internal Revenue in addi-

tion to the documents and records called for by the petitioner on review in his designation heretofore filed with the Board:

1. The reporter's transcript of the evidence and proceedings at the trial before Mr. Murdock on February 26, 1941, *i.e.*, in addition to the portions thereof designated by the Commissioner, the following additional pages: pages 1–9 [typewritten], inclusive, and pages 26–28 [typewritten], inclusive.

2. The following specified exhibits, viz.: Petitioner's Exhibits 5–10, inclusive.

3. This designation.

EDWARD C. THAYER,
Attorney for the Petitioners.

I hereby certify that on May 28, 1942, I served the foregoing designation of additional portions of the record upon the respondent by mailing, postage prepaid, a copy thereto to J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, attorney for the petitioner on review, addressed to him at the Bureau of Internal Revenue, Washington, D. C., and at the same time and in the same manner gave notice in writing of the filing of this designation with the clerk of the United States Board of Tax Appeals at Washington, D. C.

EDWARD C. THAYER,
Attorney for the Respondents on Review.

Docket No. 105004. Docket No. 105005.

[Titles omitted.]

CERTIFICATE.

I, B. D. Gamble, clerk of the United States Board of Tax Appeals, do hereby certify that the foregoing [typewritten] pages, 1 to 98, inclusive [printed pages 1 to 61], inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the

praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this fifth day of June, 1942.

B. D. GAMBLE,

[SEAL] *Clerk, United States Board of Tax Appeals.*

ORDER OF CIRCUIT COURT OF APPEALS.

June 16, 1942.

Upon motion of petitioner for review, assented to, it is ordered that those parts of the record called for by the counter-designation be omitted from the printed record on petition for review.

By the Court,

ARTHUR I. CHARRON, *Clerk.*

[fol. 63] On December 1, 1942, this cause came on to be heard, and was fully heard by the Court, Honorable Calvert Magruder, Honorable John C. Mahoney, and Honorable Peter Woodbury, Circuit Judges, sitting.

Thereafter, to wit, on December 30, 1942, the following opinion of the Court was filed:

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT, OCTOBER TERM, 1942

No. 3787

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

MERCHANTS NATIONAL BANK OF BOSTON, Executor, Respondent

Petition for Review of Decision of the United States Board of Tax Appeals

Before Magruder, Mahoney and Woodbury, JJ.

Samuel O. Clark, Jr., Assistant Attorney General; Sewall Key, Newton K. Fox, Spec. Ass'ts to the Attorney General; J. P. Wenchel, General Counsel; Ralph F. Staubly, Special Attorney, Bureau of Internal Revenue, for Petitioner.

Edward C. Thayer, for Respondent.

OPINION OF THE COURT—December 30, 1942

MAHONEY, J.:

In this case the Board of Tax Appeals reversed the determination by the Commissioner of Internal Revenue of deficiencies of $42,825.69 in income tax for 1937, and [fol. 64] $26,290.93 in respondent's estate tax. The Commissioner has filed this petition for review.

The facts in this case are not in dispute and may be stated briefly as follows: Ozro M. Field, testator, died in 1936 leaving a gross estate of $366,527.66, which included property in the amount of $52,718.75 held jointly by him and his wife, who survived him. She was sixty-seven years of age at the date of his death. Immediately after the death of

her husband the widow owned income producing property worth about $104,000 as well as tangible personal property and a country home in Buckland, Massachusetts. They had no children but during a previous marriage Mr. Field had adopted two girls and a boy. In 1936, the girls were married to husbands fully able to support them and the boy was nearly twenty-one years of age. Mr. and Mrs. Field made wills simultaneously leaving the residue of their estates to charity. Under the terms of the residuary trust of the decedent's will, the trustee was to pay the net income to Mrs. Field for her natural life, with the right to pay to or for her benefit "such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my wife, Mary L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust." Upon her death, all of the corpus of the trust except $100,000 was to go to the charities named in the will. The $100,000 retained under the will was to be held in trust and the income was to be paid in equal portions to the three adopted children and a niece of Mrs. Field's for life. As each beneficiary died, his or her share of income was to be [fol. 65] paid to certain charities and upon the death of the last beneficiary the principal of this trust was to be paid over to these charities. The widow's living expenses since the death of her husband have averaged between six and seven thousand dollars a year and during this period she has been able to save excess income of about $40,000.

In 1937 the estate realized capital gains from the sale of certain stocks held in the trust in the amount of $100,900.31, and claimed a deduction in its income tax return on the ground that this amount had been permanently set aside for the charities named in the will. This was disallowed by the Commissioner. He also disallowed a deduction of $128,276.94 in the estate tax return as gifts to charity on the ground that the power of the trustee to invade the corpus of the trust made it impossible to determine the amounts which the charitable legatees would receive.

We are asked to determine whether the bequests to charity are deductible from the gross estate under Section 303 (a)(3) of the Revenue Act of 1926,[1] 48 Stat. 9, 26 U. S. C. A. Int. Rev. Acts, p. 234, and whether the capital gains are deductible from the income of the estate realized in 1937, under Section 162(a) of the Revenue Act of 1936,[2] 49 Stat. [fol. 66] 1648, 26 U. S. C. A. Int. Rev. Acts, p. 893, as being permanently set aside for charity. We answer both of these questions in the negative and for the same reasons.

The proposition that a deduction for a charitable gift will be allowed only if the value of the charitable gift can be ascertained definitely at the date of the testator's death is not now open to dispute. *United States* v. *Provident Trust*

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[1] "Sec. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * * * *

(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *"

[2] "Sec. 162. Net Income.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit; * * *"

Co., 291 U. S. 272 (1934); *Ithaca Trust Company* v. *United States*, 279 U. S. 151 (1929); *Humes* v. *United States*, 276 U. S. 487 (1928); *Helvering* v. *Union Trust Co.*, 125 F. (2d) 401 (C. C. A. 4th, 1942); *Gammons* v. *Hassett*, 121 F. (2) 229 (C. C. A. 1st, 1941). The capital gains realized from the sale of certain securities have become part of the corpus of the trust. The same considerations which determine whether the gift in remainder to charity is definite and ascertainable at the date of the death of the testator are pertinent in a determination whether the capital gains are income permanently set aside in favor of a charity. *Commissioner* v. *Upjohn's Estate*, 124 F. (2d) 73 (C. C. A. 6th, 1941); *Commissioner* v. *F. G. Bonfils Trust*, 115 F. (2d) 788 (C. C. A. 10th, 1940).

The Board of Tax Appeals stated that this is a borderline case but, nevertheless, concluded that the facts bring it within the rule laid down in the *Ithaca Trust* case. The respondent in its brief takes a similar position.

This court is committed to the view, as laid down in [fol. 67] *Gammons* v. *Hassett*, *supra*, that as long as the requirements of the life tenant are unmeasurable and the possibility of invasion of the corpus exists under the language of the trust instrument, then the amounts going to the charitable legatees are uncertain and unascertainable at the death of the testator and cannot be deducted from the gross estate. The decision in the instant case depends upon the proper interpretation of the language used in the testamentary trust, that is, whether or not there is present a possibility of invading the corpus of the trust in the sense that that phrase was used in *Gammons* v. *Hassett*, *supra*. The intention of the testator is to be found in the four corners of the will. His language is to be literally interpreted unless there is some ambiguity as to its meaning. Here the testator clearly stated that he sought to provide for the comfort, support, maintenance and/or happiness of his wife. It is, of course, true that it is difficult to define precisely what happiness means, but happiness is essentially a subjective matter and must be left to an honest determination of the widow. The testator used both the conjunctive and disjunctive showing clearly that he did not want the term "happiness" to be considered as a catch-all. It would be torturing the language used if we were to treat the word happiness as a mere superfluity. If the widow

should desire to provide permanently for the adopted children or for near relatives such a desire would be within the term "happiness". There is thus the clear possibility that the corpus of the trust may be invaded.

We recognize, as the respondent urges upon us, that there exist certain distinctions in the case before us and *Gammons* v. *Hassett, supra.* In that case the term "desire" was used, which may be said to be somewhat broader than the term "happiness". There, an invasion of the corpus of the trust depended completely upon the will of the widow. [fol. 68] Here, there can only be an invasion of the corpus of the trust if in the sole discretion and wisdom of the trustee an invasion of the principal is deemed necessary for the happiness of the widow. But this can mean no more than that the widow must convince the trustee that an invasion of the corpus is necessary to her happiness. The testator, out of abundant caution, in order to prevent any disagreement, admonished the trustee to exercise its discretion with liberality. Assuming then that she is able to convince the trustee that her happiness requires the expenditure of sums of money beyond the income and out of the corpus of the trust, the amount that would ultimately go to charity would be uncertain. Since this possibility exists within the language of the trust instrument, the case is closer to our decision in *Gammons* v. *Hassett, supra,* than it is to the *Ithaca Trust* case. The argument that under the facts in this case there is little likelihood that Mrs. Field will want to invade the corpus of the trust is similar to the argument advanced in *Gammons* v. *Hassett, supra.* We refused in that case to consider extrinsic evidence of a most persuasive nature. The widow was ninety-three years old, had been bedridden for years and had ample property of her own for her support. We said: "While we grant that the likelihood of invasion of the principal was extremely remote at the testator's death, still the possibility of invasion did exist and, therefore, the amount of the property which would go to charity was uncertain." (p. 233.)

The respondent cites *First National Bank of Birmingham* v. *Snead,* 24 F. (2d) 186 (C. C. A. 5th, 1928), *Hartford-Connecticut Trust Co.* v. *Eaton,* 36 F. (2d) 710 (C. C. A. 2nd, 1929), *Lucas* v. *Mercantile Trust Co.,* 43 F. (2d) 39 (C. C. A. 8th, 1930) and *Commissioner* v. *F. G. Bonfils Trust, supra,* as supporting its position. These cases are clearly dis-

tinguishable. The first three deal with support and maintenance of the widow and clearly fall within the rule laid [fol. 69] down in the *Ithaca Trust* case. The position which we take in the instant case is not at all inconsistent with those holdings. In *Commissioner* v. *F. G. Bonfils Trust, supra*, the trustees were directed to collect the income from the trust estate and out of the net income to pay in their absolute discretion for the education of two minor children up to $10,000, and certain specified annuities. In the event that the income should prove insufficient to pay the annuities in full, the balance was to be paid out of the corpus of the trust estate. The will further directed that capital gains should be added to and retained as a part of the corpus of the trust estate and that within ten years after the death of the last survivor of the annuitants the corpus of the trust estate should be paid over to and expended by the foundation named in the will. The issue in that case was whether a deduction from the gross income of the trust might be taken pursuant to the terms of the will creating the trust as any part of gross income which pursuant to the terms of the will creating the trust is during the taxable year permanently set aside for charitable purposes. The amounts required for the education of the minor children and for the payment of the annuities were certain. The amount of the income that the corpus of the trust would yield was certain with the language of the *Ithaca Trust* case. It is, of course, true that as a result of changed conditions the amount of income that might result from the corpus of the trust might be diminished but this same argument was presented to the court in the *Ithaca Trust* case and was rejected as not being one of those uncertainties "appreciably greater than the general uncertainty that attends human affairs". Thus the amounts that would have to be paid out of income were measurable and it was reasonably ascertainable that the income from the corpus of the trust was more than sufficient to pay the annuitants.

In the *Ithaca Trust* case the court took the view that on [fol. 70] the basis of the past history of the widow the sums necessary for her comfort and support were ascertainable at the time of the death of the testator. As the court said (p. 154): "The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money." In the case before

us we cannot say with any degree of certainty on the basis of the record what sums will be required for the happiness of the widow. Since we cannot measure the amounts which the widow may require and since there remains the possibility that the corpus of the trust may be invaded, we are constrained to conclude that the amounts which will ultimately go to charity are uncertain and cannot be deducted from the gross estate. What we have said is equally applicable to respondent's contention that the capital gains were permanently set aside for charitable purposes.

The decision of the Board of Tax Appeals is reversed, and the case is remanded to that Board for further proceedings not inconsistent with this opinion.

On the same date, to wit, December 30, 1942, the following Final Decree was entered:

FINAL DECREE—December 30, 1942

This cause came on to be heard December 1, 1942, upon the record on petition for review of the United States Board of Tax Appeals and was argued by counsel.

Upon consideration whereof, It is now, to wit, December 30, 1942, here ordered, adjudged and decreed as follows: The decision of the Board of Tax Appeals is reversed, and the case is remanded to that Board for further proceedings not inconsistent with the opinion passed down this day.

By the Court.

(S.) Arthur L. Charron, Clerk. (Seal.)

[fol. 71] PROCEEDINGS IN CIRCUIT COURT OF APPEALS

Thereafter, to wit, on January 15, 1943, mandate issued, which was recalled and stayed by Order of Court of February 10, 1943.

Clerk's Certificate to foregoing transcript omitted in printing.

(5178)

[fol. 72] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 3, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. 864 30

Supreme Court of the United States.

OCTOBER TERM, 1942.

MERCHANTS NATIONAL BANK OF BOSTON,
EXECUTOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AND

BRIEF IN SUPPORT THEREOF.

EDWARD C. THAYER,
Attorney for Petitioner.

ADDISON C. GETCHELL & SON, LAW PRINTERS, BOSTON.

INDEX.

TABLE OF AUTHORITIES CITED.

Supreme Court of the United States.

OCTOBER TERM, 1942.

MERCHANTS NATIONAL BANK OF BOSTON,
EXECUTOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorable Justices of the Supreme Court of the United States:

The petitioner, Merchants National Bank of Boston, executor of the will of Ozro Miller Field, late of Beverly, Massachusetts, prays that a writ of certiorari may issue to review the decree of the Circuit Court of Appeals for the First Circuit entered December 30, 1942, in the case between the above-named parties, docketed therein as No. 3787. Said decree reversed a decision of the United States Board of Tax Appeals dealing with the exemption, under both federal estate and income tax laws, of gifts to charity.

Opinions Below.

The findings and opinion of the Board of Tax Appeals are reported in 45 B.T.A. 270, and printed in the Record, pp. 26-31. The opinion of the Circuit Court of Appeals is reported in 132 Fed. (2d) 483, and is printed in the Record, pp. 63-69.

Jurisdiction.

This Court has jurisdiction to review said decree under U.S. Code, Title 28, Sec. 347.

This application is made within three months after the entry of such decree, as required by Sec. 350.

Questions Presented.

1. Is the value of a remainder bequeathed to charity deductible from the gross estate in determining federal estate tax where the trustee has discretionary power to invade principal for the comfort, support, maintenance and/or happiness of the decedent's widow, and the age and circumstances of the widow and the amount of the resources available for her make any invasion a mere possibility?

2. Are capital gains accruing to such residue in 1937 deductible in determining the income tax of the estate for that year?

Statutes Involved.

The statutes involved are the Revenue Act of 1926, Sec. 303, and Revenue Act of 1936, Secs. 23 and 162. The relevant parts of these statutes are set out in the appendix (*infra*, pp. 18, 19).

Statement.

The facts are not in dispute. Article Third of the will of Ozro Miller Field leaves the residue of his estate to The Merchants National Bank of Boston in trust to pay the net income quarter-annually or oftener in the discretion of the trustee to the decedent's wife, May L. Field, during the term of her natural life. The article then contains the following paragraph:

> "My said Trustee shall also have the right to pay to, or for the benefit of my said wife, May L. Field, such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust."

Upon Mrs. Field's death the trust fund, except for $100,000, is to go to charitable beneficiaries. The trustee is to retain a fund of $100,000 and to pay the income thereof one-quarter to each of the testator's three adopted children for life and one-quarter to Mrs. Field's niece for life. One-quarter of this $100,000 fund is to go, as each beneficiary dies, to the charitable beneficiaries (Ex. 4; R. 41, 53-59).

The charitable beneficiaries are corporations of such character as to render gifts to them deductible under both the estate and income tax laws. The value of the prospective life interests of the four beneficiaries of the $100,000

fund has been computed and the tax thereon is provided for in the decision of the Board of Tax Appeals (R. 28).

The decedent, who died May 3, ~~1936~~ 1936, had been engaged in the clothing business. He appreciated that much of his fortune had been made from the public, and he and his wife, May, agreed that the money should go back to the public as much as possible. They made their wills simultaneously, leaving the remainder interests in their residuary estates to charities (R. 28, 45).

The decedent and his wife had lived prior to his death in an apartment in Beverly, Massachusetts, and in Mrs. Field's country home in Buckland, Massachusetts. They had no children. Mr. Field had been married before. He had no children by his first marriage, but he had adopted three children—two girls and a boy. These children have not been adopted by Mrs. Field. At the time of Mr. Field's death the two girls, Deborah, twenty-seven, and Elizabeth, twenty-seven, were married to husbands capable of supporting them, and the boy, Robert, was almost twenty-one (R. 27, 42). Besides these children, Mrs. Field had relatives—her niece, Deborah L. Russell, whose husband was living at the time, and her niece's children, one a boy in medical school and the other a girl, Elizabeth, who in turn was married and had two little girls. It was costing Mr. and Mrs. Field about $6000 a year to live and the mode of life in which she was living was very comfortable and satisfactory to Mrs. Field (R. 28, 42, 44, 45).

Mr. Field from time to time had given Mrs. Field money and securities; and she also had money of her own and securities she had purchased herself. The value of this property, which was all liquid and substantially all invested in income-producing securities, was $104,398.33. In addition she owned the country estate in Buckland (R. 27, 43).

The gross estate of the decedent, as determined by the Commissioner, amounted to $366,527.66 (R. 24); and the prospective estate net after all deductions and taxes was $273,820.02. This, together with the $104,398.33 of Mrs. Field's own, made the total prospective resources in cash and income-producing securities available to her amount to $378,218.35.

In 1937 securities of the estate were sold resulting in a net capital gain of $100,900.31 (R. 14, 29).

At the time of her husband's death Mrs. Field was sixty-seven years old (R. 27, 41). Since her husband's death she has lived comfortably. Her personal expenses have been between $6000 and $7000 a year (R. 28, 43), not including taxes or non-recurring expenses. Such additional expenditures, including a fur coat costing $2250, trips to Nassau and Bermuda costing $800 apiece, and taking care of those having natural claims upon her (R. 28, 29, 44, 45), amounted on the average to about $5000 a year (Ex. 3; R. 39, 51). She has been able to do whatever she wanted to do for her relatives within the amount she has spent (R. 29, 45). She has never asked for any of the principal of her husband's estate and does not intend to ask for any of it (R. 28, 46). The following table shows the amounts of income available and the total expenditures of Mrs. Field by periods (R. 28; Ex. 1, 3; R. 38, 39, 47, 49):

Period	Income	Expenditures
1936 (7 months)	$10,735.35	$ 1,853.99
1937	24,738.57	10,357.91
1938	17,480.85	11,055.91
1939	17,448.23	12,024.92
1940	16,959.66	13,389.31
Total	$87,362.66	$48,682.04

Of the income available to her she has saved about $44,000 (R. 28, 46). The estate has been holding about $41,000 uninvested (R. 28). The value of the capital held by the respondent increased from $279,764.79 at the date of death to $366,046.33 on December 31, 1940 (R. 29; Ex. 2; R. 39, 49).

The executor in its estate tax return claimed a deduction of $128,276.94, representing the value of the remainder interest in the residue, and in its income tax return for 1937 claimed a deduction of $100,900.31, representing the capital gains.

The Commissioner of Internal Revenue disallowed these deductions and determined resulting deficiencies in estate tax and income tax. The proceedings in the Board of Tax Appeals to contest such determinations were consolidated.

The Board of Tax Appeals allowed the deductions (R. 31) on the authority of *Ithaca Trust Company* v. *United States*, 279 U.S. 151, and *Helen G. Bonfils et al., Executors*, and *F. G. Bonfils Trust*, 40 B.T.A. 1079 and 1085, affirmed (C.C.A. 10), 115 Fed. (2d) 788.

The Circuit Court of Appeals for the First Circuit reversed the decision of the Board upon the ground that the case was governed by *Gammons* v. *Hassett* (C.C.A. 1), 121 Fed. (2d) 229, rather than by *Ithaca Trust Company* v. *United States*, 279 U.S. 151, and decisions in other Circuits which follow the *Ithaca Trust Company* case.

Specification of Errors

1. The Court erred in not following the decision of this Court in *Ithaca Trust Company* v. *United States*, 279 U.S. 151.

2. The Court erred in announcing a rule of strict construction of the charitable deduction provisions of the es-

tate and income tax laws at variance with the construction in favor of the charities which has been adopted in the Second, Fifth, Eighth, Ninth and Tenth Circuits [1] in conformity with the *Ithaca Trust Company* case.

3. The Court erred in holding that the case was governed by *Gammons* v. *Hassett*, 121 Fed. (2d) 229, certiorari denied, 314 U.S. 673, which case is plainly distinguishable.

4. The Court erred in disregarding the statements of the Board (which were justified by the evidence) that the standard of maintenance fixed by Mr. Field was capable of being stated in fairly definite terms of money; that the income at the death of the testator was more than sufficient to maintain the widow as required, and there was no uncertainty as to future sufficiency appreciably greater than the general uncertainty that attends human affairs (R. 30); and that the possibility of invasion was sufficiently remote to justify the deductions claimed, and substituting its own view that the requirements of the life tenant were unmeasurable, and the amounts going to the charitable legatees were uncertain and unascertainable at the death of the testator (R. 67).

Reasons for Granting the Writ.

As a result of the errors just specified, the decision below not only wrongfully deprives the charities of money which has been given to them, but instates in the First Circuit the

[1] *Hartford-Connecticut Trust Company* v. *Eaton*, 36 Fed. (2d) 710 (C.C.A. 2);
First National Bank of Birmingham v. *Snead*, 24 Fed. (2d) 186 (C.C.A. 5).
Lucas v. *Mercantile Trust Company*, 43 Fed. (2d) 39 (C.C.A. 8).
Commissioner v. *Bank of America, Exr.*, Feb. 25, 1943 C.C.H. Estate Tax Service, ¶ 10,018.
Commissioner v. *F. G. Bonfils Trust*, 115 Fed. (2d) 788 (C.C.A. 10).

very rule of strict construction which was advanced by the Court of Claims in the *Ithaca Trust Company* case [2] and was rejected by the Supreme Court.[3] This rule of strict construction, moreover, is contrary to what, in due conformity to the *Ithaca Trust Company* case, has been stated in five other Circuits [4] in similar cases and by the Board of Tax

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[2] *Ithaca Trust Company* v. *United States*, 68 Ct. Cl. 686:

> "Without entering into a discussion of what limitations there were, if any, on expenditure by the life tenant 'to suitably maintain her in as much comfort as she now enjoys,' it is evident that the failure of investments, the diminution of the income, the high cost of living, and the changing ideas of what constitutes comfort might well absorb a good part, and possibly all, of the principal sum and leave no balance for charity, and that a contingency permeates the gifts to charity which may prevent any of them from ever going into possession and enjoyment. The gifts for charitable and religious purposes, therefore, did not take effect upon the death of the testator or upon the happening of an event which would certainly occur, and consequently, within the meaning of the statute, could not be deducted from the gross estate. In view of the case, the plaintiff is not entitled to recover . . ."

Compare opinion below (R. 68):

> "Assuming then that she is able to convince the trustee that her happiness requires expenditures of sums of money beyond the income and out of the corpus of the trust, the amount that ultimately would go to the charity would be uncertain."

[3] The Attorney General was unwilling to argue in favor of this construction. From the government's brief:

> "If the widow was given an unrestrained right to use the principal in her discretion, the amount of the bequests to charity would be entirely speculative. . . . Whatever limit of judgment and discretion was allowed was vested not in the widow alone, but in the executrix and executor acting together. No large discretion was allowed. The use of only such amounts as might be 'necessary to suitably maintain her in as much comfort as she now enjoys' was permitted. That provision imposed a definite restraint on the use of the principal . . ."

[4] See footnote 1, p. 7.

Appeals. The efforts of the Court below to distinguish this case from such cases and to liken it to the *Gammons* case will not convince taxing authorities, taxpayers and lawyers that a different rule does not now apply in the First Circuit in the case of charitable trusts than elsewhere.[5]

We submit that the decision below is in conflict with the decisions of other Circuit Courts of Appeals and that there is reason to believe it is in conflict with an applicable decision of this Court. We urge that the writ issue to resolve such conflicts and to keep uniform the construction and application of the provisions in favor of charity in our estate and income tax laws.

Respectfully submitted,

EDWARD C. THAYER,
Attorney for Petitioner.

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[5] The Circuit Court of Appeals for the First Circuit apparently feels committed to the strictest construction where exemptions in favor of charity are concerned. *Cf.* comment on its decisions in the *Gammons* case and in this case by C.C.A. 9 in *Commissioner* v. *Bank of America, Exr.*, Feb. 25, 1943, C.C.H. (Est.) ¶ 16,018.

In *Old Colony Trust-Company* v. *Commissioner*, 301 U.S. 379, a very severe construction of the charitable deduction provisions was overruled by this Court.

In the *Gammons* case it was said by Judge Magruder, in his concurring opinion:

> "The *Ithaca Trust Company* case must be considered to be going to the very verge of the law and in the absence of guidance from the Supreme Court we ought not to extend the doctrine of that case, however logical and appealing the extension might be under the particular facts."

We know of nothing like this in the opinions of other Circuit Courts of Appeal or of this Court.

It was not necessary to question the *Ithaca Trust Company* case in order to decide *Gammons* v. *Hassett* (see Brief, *infra*, p. 13).

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

1. The Rule in the Ithaca Trust Company Case is Applicable to This Case.

The *Ithaca Trust Company* case, involving the estate and will of Edwin C. Stewart, closely resembles this case in the size of the estate, the purpose and character of the provisions of the will, and the age and station and mode of life of the widow.[1] The Court of Claims took the position that, because a *possibility* existed that the corpus might be used, the gifts to charity did not take effect upon an event which was *certain* to occur, and consequently were not deductible. That construction was rejected by this Court. In the opinion—279 U.S. 151—it was said (per Holmes, J.) on the question of whether the provisions for the maintenance of

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[1] The residuary estate amounted to $312,244.51. The will provided:

> "I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate which may be necessary to suitably maintain her in as much comfort as she now enjoys."

Mrs. Stewart was sixty-one years old at the date of Mr. Stewart's death. The Circuit Court of Appeals found—*Ithaca Trust Company* v. *United States*, 68 Ct. Cl. 686:

> "XIII. For many years prior to the death of said Edwin C. Stewart, he and his widow, Annie L. Stewart, lived in Ithaca, New York, in a simple and unpretentious style, spending each year less than the income produced by the estate of said testator; and the income from the estate of said testator was, at his death, and during the life of the widow, in excess of the sum necessary to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of said testator. After the payment of debts and the specific legacies, the estate produced an income in excess of the sum necessary, in the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator."

the wife made the gifts to charity so uncertain that the deduction could not be allowed:

> "The principal which could be used was only so much as might be necessary to continue the comfort then enjoyed and the standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the testator, and even after debts and specific legacies had been paid, was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."

Under the rule so announced the beneficent policy of Congress in favor of charitable deductions [2] did not have to be defeated because it was theoretically possible that under greatly changed conditions, wholly unforeseeable, invasion of principal might occur. Although that possibility existed, it was evaluated in the light of the facts of the particular case and found to be unimportant. The Board of Tax Appeals followed the *Ithaca Trust Company* case and made a similar evaluation in this case with the same result. This evaluation was ignored by the Circuit Court of Appeals.

The only distinction asserted between the *Ithaca Trust Company* case and this case lies in the use by Mr. Field of the additional words "and or happiness" and his injunction to the trustee to exercise the discretion with liberality to Mrs. Field. The language used by Mr. Field was used for the same purpose as that used by Mr. Stewart. In both cases it was a mere protective measure. It was used with reference to a standard of living long enjoyed and which was "very comfortable and satisfactory" to Mrs. Field (R. 43).

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[2] *Edwards* v. *Slocum*, 265 U.S. 61.
United States v. *Provident Trust Company*, 291 U.S. 272.
Helvering v. *Bliss*, 293 U.S. 144.

The direction for exercise of liberality was with reference to that ascertainable standard. Variation of forms of expression used have been held in other Circuits to have no controlling effect.[3] It would be unfortunate that the taxa-

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[3] *Hartford-Connecticut Trust Company* v. *Eaton*, 36 Fed. (2d) 710 (C.C.A. 2).

The power was to pay over principal which the trustee might deem necessary and advisable for the wife's comfortable maintenance and support. This was construed as intended only to secure to the beneficiary the kind of living to which she was used, the trustee was limited to the support of the widow according to her station in life, that is according to her wont.

Lucas v. *Mercantile Trust Company*, 43 Fed. (2d) 39 (C.C.A. 8), affirming the decision of the Board of Tax Appeals, *sub nom. Mercantile Trust Company, Executor*, 13 B.T.A. 85.

In this case the trustee was directed to pay to the wife all the net income—

> "or if need be, such part of the corpus thereof as may be necessary for the comfort, maintenance, and support of my wife during her life. A request in writing to the trustee made by my wife stating that the sum requested by her is needed for her comfort, maintenance and support shall be authority to my trustee to pay unto her any sum so requested out of the corpus."

Per Kenyon, Cir. J.:

> "If the will had said, as in the Ithaca Trust Company Case, 'that may be necessary to suitably maintain her in as much comfort as she now enjoys,' the cases would have been parallel, but considering all the terms of this will, the result is the same. Some one must determine what the term 'if need be' means; also what the phrase, 'may be necessary for the comfort, maintenance and support of my wife during her life,' means, and the one to determine that within reasonable bounds was the trustee. If a trustee, upon a mere written notice of the widow that she needed the entire corpus of the estate for her comfort, maintenance, and support, should turn over the same to her, it would, in our judgment, be guilty of a dereliction of duty."

Commissioner v. *Bank of America, Exr.*, Feb. 25, 1943, C.C.H. (Est.) ¶ 10,018. The direction was to pay sister $250 a month "... and in case she should, by reason of accident, illness, or

bility of charitable remainders should depend upon the precise form of words used *unless, indeed, the variation introduces material uncertainty in the particular case as to whether the legacy is going to go to charity.* The use of the word "happiness" did not wrest discretion from the trustee and confer it upon Mrs. Field. To suggest that she might conceivably importune the trustee to subsidize some very extravagant mode of life bearing no relation to that which she had formerly enjoyed with her husband is to make the same purely theoretical kind of objection, regardless of the facts which existed, as was made by the Court of Claims in the *Ithaca Trust Company* case. As found by the Board of Tax Appeals, the wording used did not materially increase the probability of the gifts not taking effect.

2. The Gammons Case is Plainly Distinguishable from This Case.

Gammons v. *Hassett* was an entirely different kind of case. It was a case where the life tenant had absolutely unrestricted power to invade corpus.[4] As is recognized in

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other unusual circumstance so require, such additional sum or sums as in the judgment of said trustee may be necessary and reasonable under the existing conditions." The will disclosed that his sister's welfare was uppermost in the maker's mind.

[4] The Supreme Judicial Court of Massachusetts, in *Dana* v. *Dana*, 165 Mass. 156, held that under similar limitations (except that the estate was legal instead of equitable) the discretionary power of the wife to spend the principal was unlimited so that she was entitled to give it away, although she had a large private fortune of her own. Per Bailey, J.:

> "He gave to his wife during his lifetime an absolute and ample power to dispose of the estate possessed as would be possessed by an owner in fee."

It cannot conceivably be considered that Mrs. Field had any such unrestricted right, or that the trustee had.

the Ithaca Trust Company opinion, a case where the life tenant has powers tantamount to ownership in fee, and the gift over is subject to his whim, is entirely different from our case and the *Ithaca Trust Company* case, where the discretion is lodged in a trustee under provisions imposing a definite restraint on the use of the principal. The degree of probability of exercise of a controlled and conditional power is capable of evaluation.

3. The Circuit Court of Appeals Failed to Apply the Rule in the Ithaca Trust Company Case.

It is plain from the opinion below that the Court did not in reality distinguish the *Ithaca Trust Company* case. The Circuit Court of Appeals was not at all interested in the evaluation which the Board of Tax Appeals made of the possibility of invasion of corpus. It did not ascertain that the evaluation did not accord with the facts and was not fully supported by the evidence. It was not interested in the facts at all and made no attempt to determine whether the uncertainty that the charities would take was appreciably greater than the general uncertainty that attends human affairs, as it should have done if it had been applying the rule in the *Ithaca Trust Company* case. In fact, the Circuit Court of Appeals, in so many words, refused to consider that question at all, because under its erroneous application of the *Gammons* case it concluded that whether or not there was any real doubt of the remainders going, augmented, to charity was a question with which it was not concerned. In its opinion, taxability is not made to depend on facts and probabilities, but on the words and expressions used.

4. Statements of Fact Made by the Board and Supported by Evidence should Not be Swept Aside.

The question of whether, in the premises, the powers given create tangible uncertainty as to whether the charities will take is essentially a factual one. On this question the Board of Tax Appeals made several statements, the gist of which was that an ascertainable standard had been established, that there was no uncertainty amounting to anything as to the future sufficiency of the income, that the possibility of invasion was sufficiently remote to justify the deductions claimed. These statements are perfectly reasonable. Few, it is submitted, would consider conditions had come to such a pass that a widow of the character and age of Mrs. Field would not in all human probability live out her life in comfort and happiness well within the income of a fortune of over a quarter of a million dollars (without reference to an estate of her own of over a hundred thousand). The Circuit Court of Appeals did not disagree with these statements (R. 67); it simply ruled that they did not make any difference.

We submit that whether or not the deductions can properly be allowed in these trust cases without impairment to the revenue which the statutes are designed to raise is essentially a question of fact, and that if they can be so allowed they ought to be in order to effectuate the plain purpose of the statute. This, we submit, is the rule in the *Ithaca Trust Company* case. It would seem that the area of application of the rule can better be worked out (as it is being worked out) [5] by a process of judicial inclusion and

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[5] Cf. *Boston Safe Deposit and Trust Company* v. *Commissioner*, 66 Fed. (2d) 179 (C.C.A. 1);
Farrington v. *Commissioner*, 30 Fed. (2d) 915 (C.C.A. 1);
Knocraychild v. *Commissioner*, 66 Fed. (2d) 401 (C.C.A. 7);

exclusion in which the function of Appellate Courts is to correct inferences from the evidence which are clearly improper in the particular cases than by substituting, as the Court of Appeals has done, a process of classifying words and expressions, and making the result depend upon the ones employed. Wills are frequently drawn by persons unskilled in the law, or in the niceties of tax law. Preoccupation with the word to the neglect of the substance is characteristic of primitive rather than enlightened jurisprudence.[5] The decision below marks a retreat from an objective achieved by the opinion in the *Ithaca Trust Company* case.

WHEREFORE the petitioner submits that the Circuit Court of Appeals for the First Circuit erred in its decision and

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Charles W. Jaynes et al., Trustees, 29 B.T.A. 259;
Old Colony Trust Company, Trustee, 33 B.T.A. 311—

in which it was held that the possibility of invasion was too substantial to permit the deduction, with—

Helen G. Bonfils et al., Executors, 40 B.T.A. 1079, and *F. G. Bonfils Trust*, 40 B.T.A. 1085, a companion case affirmed *sub nom. Commissioner* v. *F. G. Bonfils Trust*, 115 Fed. (2d) 788 (C.C.A. 10);
Sanderson, Executor, 18 B.T.A. 221;
Michigan Trust Company, 27 B.T.A. 556—

and the decision of this case in the Board of Tax Appeals, wherein it was held that the uncertainty of the remainder going to charity was so slight that the deduction could be allowed.

[5] *United States* v. *Provident Trust Company*, 291 U.S. 272.
City Bank Farmers' Trust Company v. *United States*, 74 Fed. (2d) 692 (C.C.A. 2).

These cases involved the deductibility of gifts over to charity on failure of issue to women who were found in fact unable to bear children. From the latter case, per A. N. Hand, Cir. J.:

> "We ought not to make an exemption in aid of charitable gifts depend on considerations that are wholly unreal and illusory."

that this petition for certiorari should be granted so that the decision can be reversed.

Respectfully submitted,

EDWARD C. THAYER,
Attorney for Petitioner.

Appendix.

Revenue Act of 1926, section 303:

"For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

. . . . . .

(3) The amount of all bequests, legacies, devises or transfers to or for the use of the United States, any state, territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, . . ." (See Internal Revenue Code, section 812(d).)

Revenue Act of 1936, section 23—Deductions from Gross Income:

"In computing net income there shall be allowed as deductions:

. . . . . .

(o) Charitable and Other Contributions.—In the case of an individual, contributions or gifts made within the taxable year to or for the use of:

. . . . . .

(2) a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . ."

. . . . . .

Section 162—NET INCOME:

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, . . ." (See Internal Revenue Code, sections 23(o) and 162(a).)

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 30.

MERCHANTS NATIONAL BANK OF BOSTON,
EXECUTOR,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR PETITIONER.

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INDEX.

TABLE OF AUTHORITIES CITED.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinions Below.

The findings and opinion of the Board of Tax Appeals are reported in *Estate of Ozro Miller Field*, 45 B.T.A. 270, and printed in the Record, pp. 26-31. The opinion of the Circuit Court of Appeals is reported in *Commissioner* v. *Merchants National Bank of Boston, Executor*, 132 Fed. (2d) 483, and is printed in the Record, pp. 63-69.

Jurisdiction.

The decree of the Circuit Court of Appeals was entered December 30, 1942 (R. 69).

The petition for certiorari was filed on March 29, 1943, and was granted May 3, 1943.

This Court has jurisdiction to review said decree under U.S. Code, Title 28, sec. 347.

Questions Presented.

1. Is the value of a remainder bequeathed to charity deductible from the gross estate in determining federal estate tax where the trustee has discretionary power to invade principal for the comfort, support, maintenance and/or happiness of the decedent's widow, and the age and circumstances of the widow and the amount of the resources available for her make any invasion a mere possibility?

2. Are capital gains accruing to the residue in 1937 deductible in determining the federal income tax of the estate for that year?

Statutes Involved.

Revenue Act of 1926, section 303:

"For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

. . . . . .

(3) The amount of all bequests, legacies, devises or transfers to or for the use of the United States, any state, territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary or educational purposes, . . ."

Revenue Act of 1936, section 162—NET INCOME:

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, . . ."

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. . . . . .

(2) a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes . . ."

. . . . . .

Statement of the Case.

The decedent, Ozro Miller Field, was a resident of Massachusetts who made a modest fortune in the Kennedy clothing business in which he had made his start with Mr.

Kennedy in Beverly, Massachusetts. He appreciated that much of his fortune had been made from the public, and he and his wife, May, agreed that the money should go back to the public as much as possible. They made their wills simultaneously, leaving the remainder interests in their residuary estates to charities in which they were interested, including in Mr. Field's case the Beverly Hospital, which had been built up by Dr. Johnson, the family physician (R. 28, 45).

The decedent and his wife had lived prior to his death in an apartment in Beverly and in Mrs. Field's country home in Buckland, Massachusetts, which Mr. Field had given to her (R. 27, 42). They had no children. Mr. Field had been married before. He had no children by his first marriage, but he had adopted three children—two girls and a boy. These children have not been adopted by Mrs. Field. At the time of Mr. Field's death the two girls, Deborah, twenty-seven, and Elizabeth, twenty-seven, were married to husbands capable of supporting them, and the boy, Robert, was almost twenty-one (R. 27, 42). Besides these children Mrs. Field had relatives—her niece, Deborah L. Russell, whose husband was living at the time, and her niece's children, one a boy in medical school in New York, who has since obtained a position as an interne at Bellevue Hospital, and the other a girl, Elizabeth, who in turn was married and had two little girls (R. 44). It was costing Mr. and Mrs. Field about $6000 a year to live (R. 28, 42) and Mrs. Field testified that the mode of life in which she was living was very comfortable and satisfactory to her (R. 43).

Mr. Field from time to time had given Mrs. Field money and securities, and she also had money of her own and securities she had purchased herself (R. 27, 43). The value of this property, which was all liquid and substantially all invested in income-producing securities, was $106,916.79 (R. 27; Ex. 2, R. 39, 49), subject to the payment of a Massachusetts inheritance tax of $2518.46 (R. 28) upon $52,718.75,

of such property, which was owned jointly by herself and Mr. Field (R. 27). In addition she owned the country estate in Buckland.

Mr. Field died on May 3, 1936 (R. 27).

The gross estate of the decedent, as determined by the Commissioner, amounted to $366,527.66 (R. 24) and the prospective net estate after all deductions and taxes was $273,820.02. This, together with the $104,398.33 net of Mrs. Field's own cash and investments, made the total prospective resources in cash and income-producing securities available to her amount to $378,218.35. These resources are recapitulated as follows:

Gross estate as valued by Commissioner (deficiency letter, R. 24)			$366,527.66
Less jointly held property			52,718.75
Gross estate of decedent			$313,808.91
Less:			
Deductions per deficiency letter	$117,967.86		
Restore exemption, 1926 Act	100,000.00	$17,967.86	
Federal estate tax shown on return (deficiency letter)		17,176.71	
Massachusetts inheritance taxes (deficiency letter)		4,844.32	39,988.89
Prospective net estate			$273,820.02[1]
Personal estate of Mrs. Field, including jointly owned property		$106,916.79	
Deduct Massachusetts tax on jointly owned property		2,518.46	104,398.33
Total prospective resources			$378,218.35

[1] The only legacy ahead of the residue was a bequest of all tangible personal property to Mrs. Field (Exhibit 4, R. 41, 53).

In 1937 securities of the estate, including 2,000 shares of the preferred stock of the Kennedy Company, were sold, resulting in a net capital gain of $100,900.31 (Deficiency Letter, Income Tax case, R. 14; (R. 29), The total resources available to Mrs. Field had increased by about $100,000 by January 1, 1938 (Ex. 2, R. 39, 49).

At the time of her husband's death Mrs. Field was sixty-seven years old (R. 27, 41). Since her husband's death she has lived comfortably at her home in Buckland and in first-class residential hotels (R. 43). Her personal expenses have been between $6000 and $7000 a year (R. 28, 43), not including taxes or non-recurring expenditures. Such expenditures, including a fur coat costing $2250, trips to Nassau and Bermuda costing $800 apiece, and taking care of those having natural claims upon her (R. 28, 29, 44, 45), amounted on the average to about $5000 a year (Ex. 3; R. 39, 51). She has been able to do whatever she wanted to do for her relatives within the amount she has spent (R. 29, 45). She has never asked for any of the principal of her husband's estate and does not intend to ask for any of it (R. 28, 46). The following table shows the amounts of income available and the total expenditures of Mrs. Field by periods (R. 28; Exs. 1, 3; R. 38, 39, 47, 51):

Period	Income	Expenditures
1936 (7 months)	$10,735.35	$ 1,858.99
1937	24,738.57	10,357.91
1938	17,480.85[2]	11,055.91
1939	17,448.23	12,024.92
1940	16,959.66	13,389.31
Total	$87,362.66	$48,682.04

[2] The difference between the 1937 income and the income in succeeding years is explained by the fact that federal and Massachusetts estate and inheritance taxes were paid in 1937, and that the shares of 7 per cent preferred stock of the Kennedy Company

Of the income available to her she has saved about $44,000 (R. 28, 46). The estate has been holding about $41,000 uninvested (R. 28). By December 31, 1940, the total resources had increased to over half a million dollars (Ex. 2; R. 49).

Article Third of the will leaves the residue of the estate (the only prior legacy being a bequest of tangible personal property to Mrs. Field) to The Merchants National Bank of Boston in trust to pay the net income quarter-annually or oftener in the discretion of the trustee to the decedent's wife, May L. Field, during the term of her natural life. The article then contains the following paragraph:

> "My said Trustee shall also have the right to pay to, or for the benefit of my said wife, May L. Field, such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust" (Ex. 4; R. 41, 53, 54).

Upon Mrs. Field's death the trust fund, except for $100,000, is to go to charitable beneficiaries. The trustee is to retain such $100,000 and to pay the income thereof one-quarter to each of the testator's three adopted children for life and one-quarter to Mrs. Field's niece for life. One-quarter of this $100,000 fund is to go, as each beneficiary dies, to the charitable beneficiaries (Ex. 4; R. 41, 53-59).

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were sold in February of that year, after there had been paid upon it $6 per share on account of dividends in arrears (Ex. 1, note (*d*), R. 38, 47).

The charitable beneficiaries are corporations of such character as to render gifts to them deductible under both the estate and income tax laws (R. 28). The value of the prospective life interests of the four beneficiaries of the $100,000 fund has been computed and the tax thereon is provided for in the decision of the Board of Tax Appeals (R. 31, 32).

The executor in the estate tax return claimed a deduction of $128,276.94, representing the value of the remainder interest in the residue, and in its income tax return for 1937 claimed a deduction of $100,900.31, representing the capital gains (Deficiency Letters, R. 23, 13).

The Commissioner of Internal Revenue disallowed these deductions and determined resulting deficiencies in estate tax and income tax. Proceedings were brought in the Board of Tax Appeals to contest such determinations. The proceedings were consolidated. The Board of Tax Appeals allowed the deductions (R. 31). The Circuit Court of Appeals for the First Circuit reversed the decision of the Board (R. 69).

Specification of Errors.

1. The court erred in not following the decision of this court in *Ithaca Trust Company* v. *United States*, 279 U.S. 151.

2. The court erred in announcing a construction of the charitable deduction provisions of the estate and income tax laws at variance with the construction in favor of the charities which has been adopted in the Second, Fifth, Eighth, Ninth and Tenth Circuits in conformity with the *Ithaca Trust Company* case.

3. The court erred in holding that the case was governed by *Gammons* v. *Hassett*, 121 Fed. (2d) 229, certiorari denied, 314 U.S. 673, which case is plainly distinguishable.

4. The court erred in disregarding the conclusions of the Board (which were justified by the evidence) that the standard of maintenance fixed by Mr. Field was capable of being stated in fairly definite terms of money; that the income at the death of the testator was more than sufficient to maintain the widow as required, and there was no uncertainty as to future sufficiency appreciably greater than the general uncertainty that attends human affairs (R. 30); and that the possibility of invasion was sufficiently remote to justify the deductions claimed (R. 31).

Summary of Argument.

The provisions of the federal estate and income tax laws exempting gifts to charity express an important public policy. As this court has pointed out, this policy is to be given effect, if possible, and not frustrated.

The case is governed by the decision of this court in the case of *Ithaca Trust Company* v. *United States*, 279 U.S. 151, which involved a trust of the same type. Both are cases of trusts for a widow for life with remainders to charity. In both cases the trustee was empowered to invade corpus for the protection of the wife so that it was *possible* that invasion might occur. But in neither case was the widow given any control of the corpus or any discretion; in each case the widow was advanced in age, had enjoyed a comfortable and established mode of life; and in each case the trust was substantial and produced income substantially in excess of the widow's requirements, so that the *probability* that any invasion of the remainder would occur was merely an academic one, too remote for expression by any probability factor. In short, in both cases the discretion was written into the will to protect the widow in case of catastrophe rather than against any foreseeable possibility. It was held in the *Ithaca Trust Company* case

that the possibility of invasion was tolerable and that the remainder to charity was deductible. As stated by Mr. Justice Holmes, the uncertainty that the charity would take "was not appreciably greater than the general uncertainty that attends human affairs."

The Board of Tax Appeals, upon the evidence in this case, was amply justified in finding such resemblance to the *Ithaca Trust Company* case as to warrant following it as a precedent, and applying the rule therein announced. There is nothing in this case to prevent, as a matter of law, such application.

The Circuit Court of Appeals erred in reversing the decision of the Board of Tax Appeals. It did not reverse that decision because of any asserted error committed by the Board in evaluating the possibility of invasion of the corpus, but because it felt constrained to follow its decision in the *Gammons* case. The decision in the *Gammons* case was right, but it was an entirely different kind of case. Probably the court was influenced by some observations upon the *Ithaca Trust Company* case which appeared in the opinions in the *Gammons* case (and which were wholly unnecessary to the decision in that case); possibly the true grounds for distinguishing the *Gammons* case, namely, that in that case the beneficiary had as unfettered a power to dispose of the principal as if she had been its absolute owner, was not brought to the attention of the court. The argument of the court below that the deduction could not be allowed because there was a possibility that the trust might be invaded is the same argument which was advanced by the government and adopted by the Court of Claims in the *Ithaca Trust Company* case, but rejected by this court.

Other Circuit Courts of Appeals have followed the *Ithaca Trust Company* case in cases of trusts for charity with limited powers of invasion such as ours. The decision below is in conflict with all of these decisions.

The questions of whether, in the case of any such trust, the powers given create tangible uncertainty that the charity will take and whether the deductions can properly be allowed without intolerable possibility of impairment of the revenue which the statutes are designed to raise, are essentially factual. If the deductions can be so allowed, they ought to be in order to effectuate the provisions of the statute. Under the rule in the *Ithaca Trust Company* case these questions can be decided by the tribunal which hears the evidence and sees the witnesses. The lower tribunals are of course subject to control by appellate tribunals if they arrive at conclusions not warranted by the evidence or seek to apply the rule in cases to which it is not appropriate. The experience has been that the lower courts and the Board of Tax Appeals have not hesitated to disallow the deduction when there was any substantial doubt that the remainders would go to charity, either because of insufficiency of income, possibility of increase of beneficiaries, or absence of restriction on the use of the principal. But they have allowed the deduction in many cases such as ours. It has not been shown that the rule in the *Ithaca Trust Company* case has been subject to any abuse or that it requires any modification or limitation. The rule is an enlightened one. It permits the deduction of charitable remainders in cases where they are certain to all intents and purposes to vest in charity, as Congress intended. It does not countenance a deduction when the vesting is really at all speculative, or subject to the volition of the life tenant.

Argument.

1. Exemptions favoring charity are not narrowly construed by this court.

The charitable deductions differ from other deductions in that they are not in favor of the taxpayer, but are in favor of charities serving the public welfare. Statutory provisions encouraging gifts to charity express an affirmative public policy of the first importance. This court has repeatedly stated that the provisions of the federal estate and income tax laws exempting gifts to charity from tax express the intention of Congress to encourage charitable gifts, that these provisions are liberalizations of the law begotten from motives of public policy, and that they are not to be construed narrowly. The construction of these provisions by this court has always been liberal.

Edwards v. *Slocum*, 264 U.S. 61.
United States v. *Provident Trust Company*, 291 U.S. 272.
Helvering v. *Bliss*, 293 U.S. 144.
Old Colony Trust Company v. *Commissioner*, 301 U.S. 379.

The deduction provisions of the estate tax law—sec. 303 (a)—are not couched in precisely the same words as those of the income tax law relating to trusts—sec. 162 (a)—because in the case of trusts it was necessary to make provision for the allowance of the deduction whether the income is paid over in the taxable year or accumulated for future distribution. The provisions, however, are *pari materia*. They should be construed similarly to effectuate their common purpose—*Helen G. Bonfils et al., Executors*, 40 B.T.A. 1079; affirmed 115 Fed. (2d) 788 (C.C.A. 10)—and it was so held in both the decisions below (R. 30, 66). Under both

Acts, then, the question is the same, namely, whether the gifts to charity made in Mr. Field's will are to be diminished by taxation because of the existence of any substantial doubt that those provisions will be carried out and that the whole residue of the estate will go, as he intended, for the benefit of charity. For light upon this question we turn to the opinion of the court in *Ithaca Trust Company* v. *United States*, 279 U.S. 151.

2. The Ithaca Trust Company case.

Edwin C. Stewart died on June 15, 1921, leaving a will wherein Ithaca Trust Company and his wife, Annie, were appointed executors and Ithaca Trust Company was appointed trustee. He gave to his wife the use for her life of the entire residuary estate, amounting to $347,244.51, with the added provision:

> "I also authorize my wife, Annie L. Stewart, to use any additional sum from the principal of my estate which may be necessary to suitably maintain her in as much comfort as she now enjoys."

After her death the entire residue except for $35,000 was to be administered by the surviving fiduciary for the exclusive use of enumerated charitable institutions. The widow died less than six months after the death of the decedent. This was an action commenced in the Court of Claims to recover refund of estate tax assessed as a result of the refusal of the Commissioner to allow as a deduction the value of the residuary legacy.

The Court of Claims found:[3]

> "XIII. For many years prior to the death of said Edwin C. Stewart, he and his widow, Annie L. Stew-

[3] *Ithaca Trust Company* v. *United States*, 68 Ct. Cl. 686.

art, lived in Ithaca, New York, in a simple and unpretentious style, spending each year less than the income produced by the estate of the said testator; and the income from the estate of said testator was, at his death, and during the life of the widow, in excess of the sum necessary to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of said testator. After the payment of debts and the specific legacies, the estate produced an income in excess of the sum necessary, in the absence of unusual circumstances, to maintain her suitably in as much comfort as she enjoyed at any time during the lifetime of the said testator."

The widow was sixty-one years old at the date of death. The Court of Claims refused to allow the deduction and gave as its reasons:

"Without entering into a discussion of what limitations there were, if any, on expenditure by the life tenant 'to suitably maintain her in as much comfort as she now enjoys,' it is evident that the failure of investments, the diminution of the income, the high cost of living, and the changing ideas of what constitutes comfort might well absorb a good part, and possibly all, of the principal sum and leave no balance for charity, and that a contingency permeates the gifts to charity which may prevent any of them from ever going into possession and enjoyment. The gifts for charitable and religious purposes, therefore, did not take effect upon the death of the testator or upon the happening of an event which would certainly occur, and consequently, within the meaning of the statute, could not be deducted from the gross estate. In this view of the case, the plaintiff is not entitled to recover."

The petition for certiorari raised two issues: (1) Whether the bequests to charities were deductible; and (2) whether, if the bequests were deductible, the value of the life estate should be determined according to mortality tables as at the date of death or in the light of the widow's early death.

The Government did not oppose certiorari. In its brief the Government set forth fully authorities in support of the proposition that the value of the life estate should be determined at the date of death in accordance with mortality tables, but on the question of deductibility of the charitable remainders plainly indicated that it was in sympathy with the taxpayer's position.[4]

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[4] The following quotations are taken from the brief for the Government:

> "If the widow was given an unrestrained right to use the principal in her discretion, the amount of the bequests to charity would be entirely speculative. . . .
>
> "Whatever limit of judgment and discretion was allowed was vested not in the widow alone, but in the executrix and executor acting together. No large discretion was allowed. The use of only such amounts as might be 'necessary to suitably maintain her in as much comfort as she now enjoys' was permitted. That provision imposed a definite restraint on the use of the principal. . . .
>
> "Article 56 of Regulations 37, in force at the time this case arose, provides that 'Where by the terms of the bequest, devise or gift it is subject to be defeated by a subsequent act or event, no deduction will be allowed.' Literally construed and applied to its limit, the Regulation forbade the deduction in this case because there was the possibility that a substantial part, if not all, of the principal might be absorbed in maintaining the widow. The Court of Claims so held and the arguments in support of its view are fully set out in its opinion. We are compelled to admit that we are not in accord with the views expressed in its decision or the construction placed upon the Regulations by the Bureau of Internal Revenue.
>
> "The findings show that the widow was sixty-one years of age when her husband died. She and her husband had for a long time found the income of this estate more than sufficient for their joint support. Her style of living had become fixed,

In the opinion of this court, 279 U.S. 151, it is said (per Holmes, J.):

"The case presents two questions the first of which is whether the provision for the maintenance of the wife made the gifts to charity so uncertain that the deduction of the amount of those gifts from the gross estate under section 403(a)(3), supra, in order to ascertain the estate tax, cannot be allowed. Humes v. United States, 276 U. S. 487, 494. This we are of opinion must be answered in the negative. The principal that could be used was only so much as might be necessary to continue the comfort then enjoyed. The standard was fixed in fact and capable of being stated in definite terms of money. It was not left to the widow's discretion. The income of the estate at the death of the tes-

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and at her age was not likely to become changed. In any event, she was limited by the will to the degree of comfort and standard of living to which she had become accustomed. Only shrinkage in the values of the investments and diminution of earned income from such cause would have made it necessary to use any portion of the principal. . . . As a practical matter there are more uncertainties as to the real value of a bequest to charity in an individual case when determined by mortality tables than there was in this case as to the extent to which the power to use the principal might operate to diminish the charitable bequest. . . . Of course, possibilities of losses to the trust estate through misfortune or bad investments, exist in the case of any trust with a life estate and remainder, and the presence of such elements of uncertainty in this case does not distinguish it from the ordinary case of life estate and remainder, the value of which is determined by the use of mortality tables.

"The regulations on the subject have been in effect for some years, and no doubt have been applied to a considerable number of cases, and the fact that Congress has re-enacted the statute with regulations in force is a consideration which must be borne in mind before the position of the Bureau of Internal Revenue is rejected."

All Treasury Regulations relating to the subject were called to the attention of the court in the Attorney General's brief.

tator and even after debts and specific legacies had been paid was more than sufficient to maintain the widow as required. There was no uncertainty appreciably greater than the general uncertainty that attends human affairs."[5]

Under the rule so announced the beneficent policy of Congress in favor of charitable deductions did not have to be frustrated in the Stewart case merely because it was theoretically possible that under greatly changed conditions, wholly unforeseeable, invasion of principal could occur. And the Board of Tax Appeals found, under the rule, that such policy did not have to be frustrated in the instant case.

3. THE BOARD OF TAX APPEALS WAS AMPLY JUSTIFIED IN FINDING SUCH RESEMBLANCE TO THE ITHACA TRUST COMPANY CASE AS TO WARRANT APPLYING THE RULE THEREIN ANNOUNCED.

The *Ithaca Trust Company* case closely resembles this case in the size of the estate, the purpose and character of the provisions of the will, and the age and station and mode of life of the widow. The Stewart estate was $347,244.51, the Field estate $273,820.02; but Mrs. Field had over $100,000 of her own. The purpose of the provisions in question was identical, not to provide for any foreseeable possibility of failure of income (in neither case did any such possibility exist) but to be sure that the surviving spouse would be protected *no matter what happened, i.e.,* to insure against catastrophe. Such provisions are universally inserted in wills for just this purpose. The provisions vary in expression, but are of the same character. Mrs. Stewart was sixty-

[5] The opinion then decides that the value of the life estate must be estimated as at the date of death by the mortality tables.

one years old, Mrs. Field sixty-seven. In both cases the couples had found the income from the estate more than sufficient for their joint support. The style of living of the widows had become fixed, and at their ages was not likely to become changed.

In the *Field* case there was specific testimony that the mode of life which Mr. and Mrs. Field led was very comfortable and satisfactory to her, and cost about $6000 a year (R. 42, 43). The prospective income of the estate was well over $12,000 a year without regard to her own resources, which produced three or four thousand dollars more (Exhibit 1, R. 38, 47). That these resources were ample is very strikingly borne out by the subsequent experience. Mrs. Field has lived comfortably, travelled, indulged in modest luxuries, done whatever she wanted to do for her relatives well within the amounts available to her; in fact, she accumulated about $44,000. She has never asked for any of the principal of the estate and does not intend to (R. 46).

Chairman Murdock saw Mrs. Field and heard her testify. He experienced no difficulty in placing her in the New England scene or envisaging the comfortable and benevolent manner of life she had lived and would continue to live under the compulsion of habit and of principle. He concluded that an ascertainable standard had been established, that the income of the estate at the death of the testator was more than sufficient to maintain the widow as required, and there was no uncertainty as to future sufficiency appreciably greater than the general uncertainty that attends human affairs (R. 30). He said: "This may be a borderline case, but the possibility of corpus being invaded is sufficiently remote to justify the deductions claimed" (R. 31).

For what error or under what principles of law should that decision be reversed?

4. THE CIRCUIT COURT OF APPEALS ERRED IN REVERSING THE DECISION OF THE BOARD OF TAX APPEALS.

The Circuit Court of Appeals reversed the decision of the Board of Tax Appeals because it considered its own decision in *Gammons* v. *Hassett*, 121 Fed. (2d) 229 (certiorari denied, 314 U.S. 673), to be controlling, rather than the decision of this court in the *Ithaca Trust Company* case. Thus it said:

> "The decision in the instant case depends upon the proper interpretation of the language used in the testamentary trust, that is, whether or not there is present *a possibility of invading corpus of the trust in the sense that that phrase was used in Gammons* v. *Hassett*." (Italics ours.)

The decision in the *Gammons* case was right, but it was an entirely different kind of case. In the *Gammons* case the residue was given to trustees upon the limitation:

> "The income thereof . . . and so much of the principal thereof as my said wife may at any time and from time to time need or desire, to be paid to my said wife during her life."

At this point we call attention to the Massachusetts case of *Dana* v. *Dana*, 185 Mass. 156, in which the residue was given to the wife with power

> "to sell and dispose of any or all of it at her pleasure and discretion, whenever she may think it necessary or expedient for her own comfort and happiness, without accountability to any person whomsoever."

The reversion and residue, "if any," were bequeathed to the testator's relatives. It was held that the wife took a

life estate with power of disposal in fee, and that the relatives took vested remainders, dependent upon the contingency that the exercise by the widow of the power conferred might determine their estate. Of this power it was said by Braley, J.:

> "He gave to his wife during her lifetime as absolute and ample a power to dispose of the estate devised as would be possessed by an owner in fee."

All that was necessary to the decision of the *Gammons* case was to point out that under the *Dana* case the widow's right to use the principal was unrestrained; that invasion of corpus was wholly in the widow's discretion, and that such a case is different in kind from cases of gifts where limited power of invasion is given to independent trustees.[6]

But *Dana* v. *Dana* is not referred to in the *Gammons* opinion. It was not cited in the Government's brief. If it had been called to the court's attention, the Circuit Court of Appeals might not have been greatly troubled by the *Ithaca Trust Company* case. It was troubled by that case. In the opinion of the court by Judge Mahoney, it is said:

> "If we were to extend the principle of *Ithaca Trust Company* v. *United States*—to cover this case, then the taxing authorities would be involved in litigation with respect to the likelihood of the use of the power in every case in which there was a gift to charity subject to a power of appointment away from the charity or a power to invade principal other than for mere needs."

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[6] This was recognized in the *Ithaca Trust Company* case, in the opinion, and also in the brief of the Attorney General (*supra*, pp. 15, 16).

Judge Magruder in his concurring opinion said:

> "In my opinion the case at bar could be decided in favor of the taxpayer on a perfectly logical application —or perhaps extension—of the principle laid down in *Ithaca Trust Co. v. United States*. . . . The *Ithaca Trust case* must be considered as going to the very verge of the law, and in the absence of further guidance from the Supreme Court we ought not to extend the doctrine of that case, however logical and appealing the extension might be under the particular facts."

Such is the background against which the instant case was tried in the Circuit Court of Appeals. We of course disclaim any contention that the rule in the *Ithaca Trust Company* case is applicable to a case when the widow has powers tantamount to ownership in fee and the gift over is subject to her whim.

The opinion below indicates that the Circuit Court of Appeals still does not appreciate that the case of power of disposition in the life tenant is different in kind from the case of discretion lodged in a trustee under provisions imposing a definite restraint on the use of principal; that in the first case the possibility of invasion is incapable of evaluation; that in the second case it is not. But the court does recognize that

> "there exist certain distinctions in the case before us and *Gammons* v. *Hassett*."

However, the court concludes that the distinction from *Gammons* v. *Hassett* is illusory, while the distinction from the *Ithaca Trust Company* case is fundamental. All this is made to turn upon the use by Mr. Field of the additional words "and or happiness" and his injunction to the trustee to exercise its discretion with liberality to Mrs. Field.

Happiness, says the court, is essentially a subjective matter and must be left to the honest determination of the widow. If the widow should desire to provide for her relatives, it would be the duty of the trustee to distribute principal in gratification of the desire. Thus discretion is wrested from the trustees and conferred upon Mrs. Field and the invasion of the principal is made to turn upon the volition of Mrs. Field and not of the trustees, and we are no longer concerned with a case of a trust with limited powers of invasion in the discretion of the trustees, such as the *Ithaca Trust Company* case, but rather with a case of practically unlimited power of disposition in the life tenant, like the *Gammons* case..

For such construction, no authority is cited by the court, and none is known to us. But it seems to us that it cannot conceivably be considered that Mrs. Field has any such unrestricted right, or that the trustee has. The general canon for the construction of a will is to determine the intention of the testator from the words used, having regard to the general scheme of the will, the connection in which particular words are used, and the circumstances surrounding the testator. We would suppose with considerable confidence that any court would construe the expressions used by Mr. Field, "and/or happiness" and the injunction to exercise the discretion with liberality, employed as they were in connection with the grant of discretion to the trustees for maintenance of the widow, as rather somewhat enlarging the scope of the maintenance provisions than as changing those provisions into anything approaching a power of disposition in the life tenant.[7] Had the testator desired to provide for the gratification of Mrs. Field's whims or to make the invasion of principal subject to her volition, it would have been easy to have done so.

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[7] See cases discussed *infra*, pp. 23-27.

The language used by Mr. Field was used for the same purpose as that used by Mr. Stewart. In both cases it was a mere protective measure. It was used with reference to a standard of living long enjoyed and which was "very comfortable and satisfactory" to Mrs. Field (R. 43). The direction for exercise of liberality was with reference to that ascertainable standard. Unquestionably, the additional words used by Mr. Field are not to be ignored, and they do somewhat broaden and liberalize the discretion compared with that given in the *Ithaca Trust Company* case. Quite possibly this justified the Board of Tax Appeals in speaking of this case as a borderline case, but it did not oust the Board from jurisdiction to determine on which side of the border the case lay. It did not change the trust from one of the *Ithaca Trust Company* type to one of the *Gammons* type. Remaining a case of the *Ithaca Trust Company* type, the deduction is not to be disallowed because it is *possible* that invasion can occur, but only if that possibility has some degree of *probability*. The Board of Tax Appeals found, and was entitled to find, that in the circumstances the wording used by Mr. Field did not create any material probability of the gifts' not taking effect.

From the opinion below it clearly appears that the court does not quarrel with this finding. It seeks to escape the *Ithaca Trust Company* rule by an extraordinarily wide construction of the power which Mr. Field conferred upon his trustee, thus rendering the finding of the Board immaterial and permitting the court to declare that a possibility of invasion is enough to prevent the deduction. The decision so arrived at is, of course, exactly contrary to that in the *Ithaca Trust Company* case. The decision below is completely at variance with the decisions in the other circuits.

5. OTHER CIRCUIT COURTS OF APPEALS HAVE FOLLOWED THE ITHACA TRUST COMPANY CASE IN CASES OF TRUSTS FOR CHARITY WITH LIMITED POWERS OF INVASION WHICH RESEMBLE THE FIELD TRUST.

In *First National Bank of Birmingham* v. *Snead*, 24 Fed. (2d) 186 (C.C.A. 5, 1928), an estate tax case, the trustees were empowered to pay to the wife sums out of principal

> "if at any time in the opinion of said trustees the net income from said trust estate shall not be sufficient for the proper support and comfort of my said wife . . ."

The Circuit Court of Appeals pointed out that the trustees were not empowered arbitrarily to invade the corpus and that the exercise of their discretion was subject to judicial revision and control, and that while it was barely possible, it was wholly improbable that any sum would be needed. It held that the deductions were allowable, overruling the district court which had sustained the Government's demurrer based on asserted contingency of the charitable donations. This case was decided before the decision of the Supreme Court in the *Ithaca Trust Company* case.

In *Hartford-Connecticut Trust Co.* v. *Eaton*, 36 Fed. (2d) 710 (C.C.A. 2, 1929), the trustee was empowered

> "to pay over to or for the benefit of my said wife any part of the principal of the trust fund which it may deem necessary or advisable for her comfortable maintenance and support."

The widow lived in a modest way, considering the income of her husband's estate and her own resources; and her character, taste, and standard of living were such that there was at no time any reasonable possibility that the trustee would deem it necessary to use any of the principal. It was held,

affirming the district court, that the case was ruled by the *Ithaca Trust Company* case, notwithstanding that the phrase "comfortable maintenance and support" was broader than that used in the *Ithaca Trust Company* case.[8] The phrase, by construction, was intended to secure to the beneficiary the kind of living which she had enjoyed. The court laid emphasis upon the fact that the power was not granted to the widow but to the trustee, who was limited in the exercise of the discretion.

In *Lucas* v. *Mercantile Trust Co.*, 43 Fed. (2d) 39 (C.C.A. 8, 1930), an estate tax case, the trustee was directed to pay to the wife the income or *if need be* such part of the corpus of the trust estate as might be necessary for the comfort, maintenance, and support of the wife. The will also provided

> "A request in writing to my trustee made by my wife, stating that the sum requested by her is needed for her comfort, maintenance, and support, shall be authority to my trustee to pay unto her any sum so requested out of the corpus; or in the event of her incapacity, then my trustee may, in its discretion, use so much of the corpus as may be necessary for her comfort, maintenance, and support."

The Government contended that the widow was given the unlimited right to invade the corpus and absorb any part, or all, thereof for her comfort, support, and maintenance, and therefore the value of the charitable bequests could not be ascertained. The Circuit Court of Appeals, affirming the Board of Tax Appeals, held that the power to determine where there was *need* was the trustee's and that it was not left in the discretion of the widow and that the

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[8] ". . . necessary to suitably maintain her in as much comfort as she now enjoys."

deduction was allowable under the rule in the *Ithaca Trust Company* case. The court pointed out that if the trustee, upon the mere written notice from the widow that she needed corpus for her comfort, maintenance, and support, should turn it over to her, it would be guilty of dereliction of duty.

In *Commissioner* v. *F. G. Bonfils Trust*, 115 Fed. (2d) 788 (C.C.A. 10, 1940), an income tax case, an estate having ordinary income of over $160,000 was left to charities, subject to the payment of annuities, including an annuity to the widow, amounting to $110,200 per annum. The will provided that in case the net income was not sufficient to pay all of the annuities in full, such additional amounts as might be required from time to time should be paid out of the corpus of the trust estate. The court held that the *Ithaca Trust Company* case applied and that the case was concluded by the finding of the Board of Tax Appeals.[9] The *Bonfils* case was followed by the Circuit Court of Appeals for the Sixth Circuit in *Commissioner* v. *Upjohn's Estate*, 124 Fed. (2d) 73, a very similar case.

Commissioner v. *Bank of America, N.A., Ex'r.*, 133 Fed. (2d) 753 (C.C.A. 9), is an estate tax case, decided Feb-

[9] *F. G. Bonfils Trust*, 40 B.T.A. 1085. See also *Helen G. Bonfils et al., Executors*, 40 B.T.A. 1079, the companion case, which contains the reasoning of the Board, which we submit is excellent: *viz.* (at p. 1083): "In our opinion the basic principle underlying the decision in *Ithaca Trust Company* v. *United States*, 299 U.S. 151, suggests the proper approach to the interpretation of the phrase 'permanently set aside . . .' Though a deduction is a matter of legislative grace and the proof must bring it clearly within the statutory provisions, it is a matter not only of judicial inclination, but also the legislative policy to encourage gifts and transfers to charitable institutions . . . Thus, whether or not the income of the estate would be 'permanently set aside' calls for the application of the test of reasoning, not the blind adherence to the definition of words. The question of the reasonable probability that any part of the capital gains would be required to pay annuities is a factual one."

ruary 25, 1943, after the decision below had been handed down. In this case the testator declared that his only near kin was a sister and that her welfare was uppermost in his mind. He bequeathed her his home and household property. The residue of the estate was bequeathed to the respondent bank in trust to pay the sister $250 per month

> ". . . and in case she should, by reason of *accident, illness, or other unusual circumstances* so require, such additional sum or sums as in the judgment of said trustee may be necessary and reasonable under the existing circumstances."

The remainder went to charity. The sister was seventy-nine years old, and her eyesight was impaired. She had a home and income-producing property from which she derived an income of approximately $900. Her living expenses were approximately $1,450. The income of the estate was approximately $5,000. The Commissioner argued,[10] that where the bequest was subject to an intervening life estate, the existence of the legal power to invade the corpus, or the mere possibility of invasion, was sufficient to defeat the deduction. The Board of Tax Appeals, in a Memorandum Opinion, Dec. 12183-A, was of the opinion that on the facts of the case any probability of the trustees' delving into corpus or even into surplus income was so inconsiderable as to render the value of the charitable bequest capable of a definite ascertainment. The Circuit Court of Appeals in affirming the decision of the Board on authority of the *Ithaca Trust Company* case said that it did not understand that this court had announced such a hard and fast rule as the Commissioner contended

[10] Notwithstanding that in the *Ithaca Trust Company* case the precisely similar reasoning of the Court of Claims had been overruled by this court.

for, although it acknowledged that the views advanced appeared to have found acceptance in the decisions of the Circuit Court of Appeals for the First Circuit in the *Gammons* and the *Merchants National Bank* cases. The court pointed out that nothing was left in the sister's discretion and that the discretion of the trustee to meet the designated sum was confined to what was reasonably necessary. The court said:

> "Naturally; cases arising under this statute present gradations of probability; and we do not wish to be understood as suggesting that charitable bequests in the remainder are deductible where there is a real likelihood of an undetermined part of the corpus being taken for the benefit of the life tenant. It is the duty of the Commissioner in administering this statute to give effect to the beneficent purpose of Congress; and we believe a proper performance of the duty requires that attention be paid to the actualities of each case. The administrative difficulties in the way of doing that are not insurmountable. On the other hand, blind adherence to arbitrary standards must result, in many instances, in the needless frustration of the legislative policy."

We submit that the decision below is in conflict with all of the foregoing decisions.

6. THE RULE IN THE ITHACA TRUST COMPANY CASE IS AN ENLIGHTENED ONE. IT HAS WORKED WELL. THE DECISION BELOW IS NOT CALLED FOR BY ANY PRACTICAL CONSIDERATIONS. IT IS A STEP BACKWARD. IT SHOULD BE REVERSED.

The rule in the *Ithaca Trust Company* case is, as we understand it, that in cases where the discretion is vested

in a trustee, to be exercised in accordance with some ascertainable standard, the deduction is to be allowed where there is no material uncertainty that the charity will take. It is an enlightened rule. To the problem of protecting the revenues on the one hand and giving desirable assistance to charity on the other it offers a practical solution. Is there indeed any doubt? In the light of the purpose which the testator intended to express, the age and character and mode of life of the life tenant, the size of the estate, other resources available, and any and all other material considerations, is there, indeed, any uncertainty appreciably greater than the general uncertainty that attends human affairs? This is largely a factual question. Under the rule of the *Ithaca Trust Company* case this question can be determined in the light of all the circumstances by the tribunal that finds the facts and sees and hears the witnesses. If it finds that in fact there is no material uncertainty, and the finding is supported by evidence, then the deduction is allowed as Congress intended it to be. Under the rule weight is given to the legislative policies involved. Where the possibility of impairment of revenue is sufficiently remote, the policy of encouraging charity can be carried into effect.

Reported cases show that the rule has worked well. There is no indication that it has been the subject of abuse. The courts and the Board of Tax Appeals have been quick to disallow the deduction where there was any substantial doubt that the remainders would go to charity, either because of insufficiency of income,[11] possibility of increase of beneficiaries,[12] or absence of restriction on the use of prin-

[11] *John & Pauline Tonningsen Trust*, 43 B.T.A. 37; affirmed (C.C.A. 9), 126 Fed. (2d) 48. *Springfield Safe Deposit & Trust Co. et al., Executors*, 43 Fed. Supp. 401.

[12] *Boston Safe Deposit & Trust Company v. Commissioner*, 66 Fed. (2d) 179 (C.C.A. 1). *Charles W. Jaynes et al., Trustees*, 29 B.T.A. 259.

cipal.[13] On the other hand, they have allowed the deduction in appropriate cases, many of which we have cited [14]. In no case where the deduction has been allowed does it appear at all probable that any invasion of corpus will ever be called for. And in the case at bar we do not believe that anybody, (including the judges of the First Circuit Court of Appeals,[15]) feels any doubt that a widow of the character and age of Mrs. Field will in all human probability live out her life in comfort and happiness (so far as money can conduce thereto) well within the income of over a quarter of a million dollars, without reference to her own estate of over $100,000.

Under the decision below all of the foregoing considerations are swept aside and all is made to depend upon the particular expression employed by the testator. If he goes beyond the words used in the *Ithaca Trust Company* case, consideration of extrinsic evidence or intrinsic probability is excluded and the deduction denied. If possible to conjecture any possibility, however remote or unlikely, under which corpus could be invaded, the deduction is de-

[13] *Gammons* v. *Hassett*, 36 Fed. Supp. 529. *Knoernschild* v. *Commissioner*, 97 Fed. (2d) 213 (C.C.A. 7). *Helvering* v. *Union Trust Co. of D.C., Executor*, 125 Fed. (2d) 401 (C.C.A. 4); certiorari denied, 62 S. Ct. 1292. *Mary B. Pomerene, Executrix*, T.C. Memo. Op., June 24, 1943, C.C.H. Estate Tax Service, ¶7076. *Norris et al., Executors*, v. *Commissioners* (C.C.A. 7), April 5, 1943; C.C.H. Estate Tax Service, ¶10,031; certiorari applied for. *First Trust Co. of St. Paul* v. *Reynolds* (C.C.A. 8), August 13, 1943; C.C.H. Estate Tax Service, ¶10,058.

[14] See also *Sanderson, Executor*, 18 B.T.A. 221; *Boston Safe Deposit & Trust Company*, 21 B.T.A. 394. *Michigan Trust Company*, 27 B.T.A. 556. *Estate of Mary A. Hume*, T.C. Memo. Op., May 20, 1943; C.C.H. Estate Tax Service ¶7060.

[15] Per Mahoney, J. (R. 67): "The argument that under the facts in this case there is little likelihood that Mrs. Field will want to invade the corpus of the trust is similar to the argument advanced in *Gammons* v. *Hassett*, supra. We refused in that case to consider extrinsic evidence of a most persuasive nature."

nied. No showing has been made calling for so severe a construction.

We submit that better results can be obtained by developing the rule in the *Ithaca Trust Company* case (as it is being developed) by a process of judicial inclusion and exclusion than by substituting, as the Circuit Court of Appeals has done, a classification of words and expressions, and making the result depend upon the ones employed. Wills are frequently drawn by persons unskilled in the law, or in the niceties of tax law. It would be unfortunate if the taxability of charitable remainders should depend upon the precise form of words used, unless, indeed, the variation introduces a material uncertainty. Preoccupation with words of art to the neglect of substance is characteristic of primitive rather than enlightened jurisprudence.[16] The decision below marks a retreat from an objective achieved by the opinion in the *Ithaca Trust Company* case, and should be reversed.

Respectfully submitted,

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Attorney for Petitioner.

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[16] *United States* v. *Provident Trust Company*, 291 U.S. 272. *City Bank Farmers' Trust Company* v. *United States*, 74 Fed. (2d) 692 (C.C.A. 2). These cases involved the deductibility of gifts over to charity on failure of issue to women who were found in fact unable to bear children. From the latter case, per A. N. Hand, Cir. J.: "We ought not to make an exemption in aid of charitable gifts depend on considerations that are wholly unreal and illusory."

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 864

MERCHANTS NATIONAL BANK OF BOSTON, EXECUTOR, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENT

There are two related questions in this case: (1) Whether a charitable bequest in remainder of the corpus of a testamentary trust is deductible for estate tax purposes under Section 303 (a) (3) of the Revenue Act of 1926, c. 27, 44 Stat. 9, where the trustee is empowered to invade the corpus for the "comfort, support, maintenance and/or happiness" of the life beneficiary, the testator's wife; and (2) whether, in these circumstances, a capital gain realized by the trust is deductible in computing its net income under Section 162 (a) of the Revenue Act of 1936, c. 690, 49

322214—43

Stat. 1648, as income "which pursuant to the terms of the will * * * is * * * paid or permanently set aside" for charitable purposes.

The Circuit Court of Appeals held that since the requirements of the widow were unmeasurable and under the terms of the trust there was the possibility that the corpus would be invaded, the amounts going to charity were uncertain; accordingly, the deductions were disallowed for both estate tax and income tax purposes. The court, in accordance with its earlier decision in *Gammons* v. *Hassett*, 121 F. 2d 229, certiorari denied, 314 U. S. 673, considered irrelevant certain evidence as to the likelihood that the life tenant would want to invade the corpus. The Circuit Court of Appeals for the Ninth Circuit, however, basing its decision on *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, has recently ruled that, although there is a power of invasion, the deduction is allowable if extrinsic facts show that the possibility is remote. *Commissioner* v. *Bank of America, Etc.*, 133 F. 2d 753 (C. C. A. 9). While the facts of the cases are different, the decisions are basically in conflict. Compare the decision of the Circuit Court of Appeals for the Tenth Circuit in *Commissioner* v. *F. G. Bonfils Trust*, 115 F. 2d 788.

We think the decision below is correct. It is in accord with Treasury Regulations of long

standing.[1] See Haney, C. J., dissenting in *Commissioner* v. *Bank of America, supra.* The contrary view represents an unnecessary and unsound extension of the *Ithaca Trust Co.* decision. In view of the *Bank of America* case, however, we do not oppose issuance of the writ here.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

APRIL 1943.

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[1] Treasury Regulations 80, Article 47, provides:

"ART. 47. *Conditional bequests.*— * * *

"If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."

The provisions of Treasury Regulations 63 (1922 ed.), Article 50; Treasury Regulations 68, Article 47; Treasury Regulations 70, Article 47; and Treasury Regulations 105, Section 81.46, are identical except that the first three begin with the word "where" instead of "if."

U. S. GOVERNMENT PRINTING OFFICE: 1943

INDEX

CITATIONS

Miscellaneous—Continued. Page

Treasury Regulations 70 (1926 and 1929 Eds.):

Art. 44 15

Art. 47 16

Treasury Regulations 80 (1934 Ed.):

Art. 44 ..... 4, 15

Art. 47 ..... 4, 8, 15

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 30

MERCHANTS NATIONAL BANK OF BOSTON,
PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 26–32) is reported in 45 B. T. A. 270. The opinion of the United States Circuit Court of Appeals (R. 63–69) is reported in 132 F. 2d 483.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on December 30, 1942 (R. 69). The petition for a writ of certiorari was filed on

March 29, 1943, and granted on May 3, 1943 (R. 70). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a charitable bequest in remainder of the corpus of a testamentary trust is deductible for estate-tax purposes under Section 303 (a) (3) of the Revenue Act of 1926, as amended, and the applicable Treasury Regulations, where the trustee is empowered to invade the corpus for the "comfort, support, maintenance and/or happiness" of the life beneficiary, the testator's wife.

2. Whether, in these circumstances, a capital gain realized by the trust is deductible in computing net income under Section 162 (a) of the Revenue Act of 1936, as income "which pursuant to the terms of the will * * * is * * * paid or permanently set aside" for charitable purposes.

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 303 [as amended by Sec. 403 (a) of the Revenue Act of 1934, c. 277, 48 Stat. 680]. For the purpose of the tax the value of the net estate shall be determined—
>
> (a) In the case of a citizen or resident of the United States by deducting from the value of the gross estate—
>
> * * * * *

(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * *.

* * * * * *

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (o)) any part of the gross income, without limitation, *which pursuant to the terms of the will* or deed creating the trust, is during the taxable year paid or *permanently set aside* for the purposes and in the manner specified in section 23 (o), or is *to be used exclusively* for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit; [Italics supplied.]

* * * * * *

Treasury Regulations 80 (1934 Ed.):

> ART. 44. *Transfers for public, charitable, religious, etc., uses.*— * * *
>
> If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *
>
> * * * * * *
>
> ART. 47. *Conditional bequests.*— * * *
>
> If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

STATEMENT

The facts as found by the Board of Tax Appeals (R. 27–29) may be summarized as follows:

Ozro M. Field, testator, died in 1936 leaving a gross estate of $366,527.66, which included property in the amount of $52,718.75 held jointly by him and his wife, who survived him. She was sixty-seven years of age at the date of his death. Immediately after his death the widow owned income-producing property worth about $104,000 as

well as tangible personal property and a country home in Buckland, Massachusetts. They had no children but during a previous marriage Mr. Field had adopted two girls and a boy. In 1936, the girls were married to husbands fully able to support them and the boy was nearly twenty-one years of age. (R. 27.) Mr. and Mrs. Field made wills simultaneously leaving the remainder interests of their estates to charity (R. 28).

Under the terms of the residuary trust of the decedent's will, the trustee was to pay the net income to Mrs. Field for her natural life (R. 53), with the right to pay to or for her benefit (R. 54)—

> such sum or sums from the principal of the trust fund and at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust.

Upon her death, all of the corpus of the trust except $100,000 was to go to named charities; the $100,000 was to be retained in trust for the benefit

548576—43—62

of the three adopted children and a niece of Mrs. Field, and as each such beneficiary died, his or her share was to go to named charities (R. 27–28). The widow's ordinary living expenses since the death of her husband (excluding taxes, nonrecurring expenses, or large amounts expended for such purposes as traveling, gifts, automobiles, etc.) have averaged between six and seven thousand dollars a year (R. 28), and during this period she has been able to save excess income of about $40,000 (R. 29, 44–45).

In 1937 the estate realized capital gains from the sale of certain stocks held in the trust in the amount of $100,900.31, and claimed a deduction in its income tax return under Section 162 (a) of the Revenue Act of 1936, on the ground that this amount had been permanently set aside for the charities named in the will. This was disallowed by the Commissioner. (R. 29.) He also disallowed a deduction of $128,276.94 in the estate tax return with respect to the gift of the remainder to charity, on the ground that the power of the trustee to invade the corpus of the trust made it impossible to determine the amounts which the charitable legatees would receive (R. 23–24).

The Board of Tax Appeals, with four members dissenting, decided that the possibility of invading the corpus was sufficiently remote to justify the deduction of the charitable bequest from the gross estate and the capital gain from

gross income. The Commissioner appealed to the Circuit Court of Appeals, which reversed the decision of the Board on the ground that since the requirements of the life tenant are unmeasurable and the possibility of invasion of the corpus exists under the language of the trust instrument, the amounts going to the charitable legatees are uncertain and unascertainable at the death of the testator and cannot be deducted from the gross estate.

SUMMARY OF ARGUMENT

I

Under the terms of the decedent's will the trustee was authorized to pay to Mrs. Field or for her benefit such sums from the principal of the trust as it might deem wise for her "comfort, support, maintenance, and/or happiness." and the trustee was admonished to exercise its discretion with "liberality" to her and to "consider her welfare, comfort and happiness prior to claims of residuary beneficiaries." Since the requirements for her "happiness," either present or future, may extend over an exceedingly wide range, there is obviously no way of ascertaining to what extent, if at all, the charitable remainders will ever take effect. The decedent has thus failed to make a charitable bequest capable of being measured by any known standards in terms of money, and it seems plain that Congress never in-

tended to allow the deduction in such circumstances. If the question were open to doubt, it would be resolved by Treasury Regulations which have been continuously in effect for over twenty years and which govern this precise issue. Article 47 of Regulations 80 provides that "If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it * * * not deductible had it been directly so bequeathed * * *, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power." These regulations are a reasonable construction of the statute; they have been in effect and have been the basis for administrative action for a long period of time; they should not now be overturned.

II

In 1937 the trust realized a capital gain of $100,900.31 which was added to corpus and became subject to the same hazards of diversion for Mrs. Field's benefit as are discussed above in Point I. That gain is therefore not exempt from income tax under Section 162 (a) of the Revenue Act of 1936 which allows as a deduction the income "which pursuant to the terms of the will * * * is * * * permanently set aside" for charitable purposes.

ARGUMENT

I

SINCE THE AMOUNTS WHICH MAY BE PAID TO THE LIFE BENEFICIARY UNDER THE TERMS OF THE TRUST CAN NOT BE MEASURED AND THERE IS A POSSIBILITY THAT THE CORPUS OF THE TRUST MAY BE INVADED, THE BEQUESTS TO CHARITY ARE NOT DEDUCTIBLE FROM THE GROSS ESTATE UNDER SECTION 303 (a) (3) OF THE REVENUE ACT OF 1926, AS AMENDED, AND THE APPLICABLE TREASURY REGULATIONS

1. The decedent, a resident of Massachusetts, bequeathed the remainder of his estate to certain charities subject to a life estate in his wife, with power in the trustee to pay for the benefit of his wife such sums from the principal of the trust fund as the trustee shall in its sole discretion deem proper for the comfort, support, maintenance, "and/or happiness" of his wife. The decedent in his will expressly admonished the trustee to exercise its discretion with "liberality" to his wife, "and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries" under the trust. (R. 53–54.) It should not be necessary to labor the argument that under the terms of the decedent's will, there is no method of ascertaining how much of the principal the trustee will use in any one year for the benefit of decedent's wife. Assuming that one could reduce the amount necessary for the wife's comfort, support, and maintenance in any year to a fixed sum, there

is no means by which one could ascertain how much of the principal would be necessary for her "happiness."

The decedent's wife might indicate to the trustee that a new automobile, a fur coat, a trip abroad, a substantial gift to a relative might make her happy. Indeed, the Board found that such expenditures were in fact made: $855 for an automobile and later $1,435 for another, $2,250 for a mink coat, $1,600 for two trips, $700 to help her niece when her husband died, $1,500 to help the niece's son finish medical school, and an undisclosed amount for a fur coat for one of her husband's adopted children (R. 28–29). Under the terms of the will it was impossible to say how much of the principal the trustee would pay for the wife's benefit during any year of the remainder of her life. Mrs. Field owned a country home at Buckland which had been purchased in earlier years for only $3,000 (R. 42); conceivably, she might regard it as necessary to her happiness at some later time to acquire a less modest estate that would be more commensurate with her potential resources. The range of her possible future expenditures is exceedingly wide and it is unimportant that it is her *present* intention to confine her expenditures within narrow limits. The critical consideration is that, under the terms of the will, the corpus may be invaded virtually at the whim of the widow, which cannot presently be forecast,

and that it is therefore impossible to assign any value to the charitable remainder. Moreover, the wholly conjectural nature of the widow's possible future demands against corpus is underscored by the relatively narrow gap in 1940 between her expenditures of $13,389.31 and the combined income from her own property and the trust in the amount of $16,959.66 (R. 28). Certainly, a trust in which the widow was given the uncontrolled power to revoke charitable remainders could not satisfy the statute, even though the widow were to testify that she had no intention of exercising that power, for actual control over property has always been regarded under the revenue laws as equivalent to ownership.[1] And under the terms of the decedent's will, the charitable bequests were subject to substantially the same hazards of divestment.

Under the decisions of the courts of the state in which the decedent was a resident at the time of his death, the words "comfort and happiness"

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[1] Cf. *Estate of Sanford* v. *Commissioner*, 308 U. S. 39; *Burnet* v. *Guggenheim*, 288 U. S. 280; *Porter* v. *Commissioner*, 288 U. S. 436; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; *Chase National Bank* v. *United States*, 278 U. S. 327; *Corliss* v. *Bowers*, 281 U. S. 376; *Helvering* v. *Horst*, 311 U. S. 112, 119. See also *Helvering* v. *Stuart*, 317 U. S. 154, 170–171; *Altmaier* v. *Commissioner*, 116 F. 2d 162, 165 (C. C. A. 6th), certiorari denied, 312 U. S. 706; *Kaplan* v. *Commissioner*, 66 F. 2d 401, 402 (C. C. A. 1st); *Rollins* v. *Helvering*, 92 F. 2d 390, 395 (C. C. A. 8th); *Esty* v. *United States*, 63 C.Cls. 455, 462–463; *Helvering* v. *Evans*, 126 F. 2d 270, 272–273 (C. C. A. 3d), certiorari denied, 317 U. S. 638, rehearing denied, 317 U. S. 706.

have been construed to cover mental satisfaction as well as physical comforts. See *Dana* v. *Dana*, 185 Mass. 156; *Griffin* v. *Kitchen*, 225 Mass. 331.[2]

In *Dana* v. *Dana, supra*, the testator gave his wife the residue of his estate for life, with power (p. 157)—

> to sell and dispose of any or all of it at her pleasure and discretion, whenever she may think it necessary or expedient for her own comfort and happiness, without accountability to any person whomsoever—

with the reversion, if any, to certain others. It appeared that the widow spent part of the principal during her lifetime for charitable purposes, and the question was whether her executors must make good that amount. The court held that under the will the widow had full power, not only to use the income, but also to expend the principal, either in whole or in part, as she might deem advisable for her own personal welfare and enjoyment. The court said (p. 159):

> That she had a private fortune of her own, amply sufficient for her support, does not change the legal force of the language employed by the testator, or cut down his clearly expressed intention, by making his purpose depend in any degree upon the fact that she possessed a separate estate.

[2] The law of Massachusetts would seem to control the construction of the decedent's will because he was a resident of Massachusetts on the date of his death. *Hartford-Connecticut Trust Co.* v. *Eaton*, 36 F. 2d 710 (C. C. A. 2d).

No such limitation is imposed by him; neither was it his design to restrict her to the use of only so much of the principal as might be necessary for her comfortable physical support and existence.

The power of disposal given to her was not for this object alone, though undoubtedly it was in the mind of the testator, and is included in the language used by him. But in addition, she was to spend and enjoy it in the largest manner for her happiness, and nothing appears in the record to raise the suggestion, that in her use of the property, Mrs. Greenleaf wished to deplete the estate of her husband, in order to preserve or increase her own.

If through reasons of religion or of benevolence, and for her mental satisfaction, she chose to devote any part of the estate left to her, in aid of either charitable or philanthropic objects, there is nothing in the terms of his will that restricts her from making such use of the principal; and if the testator did not care to confine her discretionary powers, there is no duty incumbent on us to seek for reasons to limit their exercise.

It is entirely possible that the widow herein might become displeased with the designated charitable recipients and wish to divert the funds to some other worthy cause which may or may not qualify as a charity under the statute. But the deduction for estate tax purposes should be allowable only

if it can satisfy the statutory requirement as of the date of the decedent's death. If the deduction herein were allowed and the funds subsequently diverted to the widow's personal uses or to some noncharitable purpose after the running of the period of limitations, we are aware of no method whereby the Treasury could recover the full tax. It is therefore all the more important that the charitable bequest must qualify for the deduction as of the date of death, and if it is subject to divestment by conditions that cannot be measured it should not be allowable.

Obviously the statute is not designed to permit a deduction for the bequest of a fund which may be used indifferently for charitable and noncharitable purposes. It is only the value of the testator's bequest to charity that is deductible (*Taft* v. *Commissioner*, 304 U. S. 351) and the amount of the bequest must be ascertainable at the date of death. *Humes* v. *United States*, 276 U. S. 487; *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. It follows that where the testator has bequeathed property in trust with a remainder to charity, but has given the trustee power to invade the corpus for the benefit of the life tenant, no deduction is allowable unless the power of invasion is restricted by standards that are capable of being measured in terms of money so that the value of the charitable remainder can be ascer-

tained. This is the construction placed on the statute by the regulations.

2. Two provisions of the regulations bear directly upon this issue. Articles 44 and 47, Regulations 80 (1934 Ed.). Article 44 provides generally:

> If a trust is created for both a charitable and a private purpose, deduction may be taken of the value of the beneficial interest in favor of the former only insofar as such interest is presently ascertainable, and hence severable from the interest in favor of the private use. * * *

Moreover, Article 47 unambiguously covers this very case:

> If the legatee, devisee, donee, or trustee is empowered to divert the property or fund, in whole or in part, to a use or purpose which would have rendered it, to the extent that it is subject to such power, not deductible had it been directly so bequeathed, devised, or given by the decedent, deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power.

The foregoing provisions have been in effect over a long period of years. Article 44 goes back at least to the regulations promulgated under the Revenue Act of 1921,[3] and the provisions of Article

[3] See Article 47, Regulations 63 (1922 Ed.); Article 44, Regulations 68 (1924 Ed.); Article 44, Regulations 70 (1925 and 1929 Eds.). The validity of these provisions has been upheld in *Burdick* v. *Commissioner*, 147 F. 2d 972, 974 (C. C. A. 2d), certiorari denied, 314 U. S. 631.

47 have been in effect continuously for an even greater number of years.[4] The applicable statutory provisions, to the extent relevant, have remained substantially unchanged during this entire time.[5] These regulations should be sustained unless plainly inconsistent with the statute. *Edward's Lessee* v. *Darby*, 12 Wheat. 206, 210; *United States* v. *Moore*, 95 U. S. 760, 763; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294; *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100, 101–103. And they derive even greater strength from the repeated reenactments of the statute. *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *Brewster* v. *Gage*, 280 U. S. 327, 337; *Burnet* v. *Thompson Oil & G. Co.*, 283 U. S. 301, 307–308; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, 492–493; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466–467; *Mass. Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269, 273; *Helvering* v. *Winmill*, 305 U. S. 79, 83; *Morgan* v. *Commissioner*, 309 U. S. 78, 81; *Reinecke* v. *Smith*,

[4] Article 56, Regulations 37 (1919 and 1921 Eds.); Article 50, Regulations 63 (1922 Ed.); Article 47, Regulations 68 (1924 Ed.); Article 47, Regulations 70 (1926 and 1929 Eds.).

[5] Section 303 (a) (3) of the Revenue Act of 1926, *supra*; Section 303 (a) (3) of the Revenue Act of 1924, c. 234, 43 Stat. 253; Section 403 (a) (3) of the Revenue Act of 1921, c. 136, 42 Stat. 227; Section 403 (a) (3) of the Revenue Act of 1918, c. 18, 40 Stat. 1057.

289 U. S. 172, 175. See, particularly, *Taft* v. *Commissioner*, 304 U. S. 351, 355–357, where this Court sustained cognate regulations with respect to Section 303 (a).

Applying the statute and regulations[6] to this case, the charitable bequests were not deductible because they were wholly unascertainable at the date of the decedent's death, it being impossible to determine how much of the principal would be diverted for the "happinesss" of the life beneficiary.

3. Apart from the regulations, it is clear under the decisions that the deduction is not allowable here. In *Humes* v. *United States*, 276 U. S. 487, the decedent had established a testamentary trust with remainders to charity that were to take effect if a prior beneficiary died without issue before reaching a specified age. This Court held that there could be no deduction because the contingencies were such as not to be capable of ascertainment as of the date of death. On the other hand, in *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, there was a bequest in remainder to charity where the decedent's wife, the life tenant, was authorized to use any sum from principal "that may be necessary to suitably maintain her in as much comfort as she now enjoys." The

[6] In addition to the foregoing regulations, the Treasury Department has published a ruling which denies the deduction in a situation substantially identical with that herein. E. T. 12, 1939–2 Cum. Bull. 335.

Court ruled that since the widow's right to take corpus was not left to her discretion but was based upon an ascertainable standard "fixed in fact and capable of being stated in definite terms of money" (279 U. S. at 154), the value of the remainder could be determined with sufficient certainty to justify the deduction.

The ruling in the *Ithaca Trust* case thus shows that the deduction is allowable only where the amount which may be diverted is capable of measurement by recognized standards. In that case the amount required by the widow to maintain her "in as much comfort as she now enjoys" was susceptible of ascertainment by reference to objective existing facts, namely, her then mode of life. "It was not left to the widow's discretion" (279 U. S. at 154). In the instant case, however, the entire corpus could be invaded to satisfy the widow's "happiness," and there are no existing standards which limit the amount that could be diverted for her. Although it may be possible to make a finding as to what her *present* happiness may require, there are obviously no reliable criteria for determining what her state of mind may demand in *future* years for her happiness, and certainly the Commissioner in assessing taxes should not be required to guess. If a testator wishes to obtain a charitable deduction, it is not too much to ask that his charitable bequest be measurable with reasonable certainty, and the statute has been so

construed in the foregoing cases. The allowance of the deduction in the *Ithaca Trust* case went to the "very verge of the law" (see Magruder, J., concurring in *Gammons* v. *Hassett*, 121 F. 2d 229), and should not be extended further. The theory of that decision requires that the deduction sought herein be disallowed.

A somewhat similar situation was presented in *Robinette* v. *Helvering*, 318 U. S. 184, 188–189, where reversionary interests retained by the grantors in certain inter vivos trusts were held not to be deductible in computing gift tax because they were incapable of ascertainment by recognized actuarial methods; such retained interests, however, were deductible in the companion case, *Smith* v. *Shaughnessy*, 318 U. S. 176, where they were capable of valuation.

The decisions in the lower courts have not been entirely consistent with each other. The earlier decision of the court below in *Gammons* v. *Hassett*, 121 F. 2d 229, certiorari denied, 314 U. S. 673, is in accord with the result herein. The widow was authorized to take as much corpus as she might "need or desire"; and although the court recognized the unlikelihood of actual invasion of corpus, it denied the deduction because there was "no standard fixed in fact by which we could measure either the extent of the life tenant's desires or the likelihood of an exercise of those desires." 121 F. 2d at 233. Similar results were reached in *Knoernschild* v. *Commissioner*, 97 F.

2d 213 (C. C. A. 7th), and *Pennsylvania Co. for Insurances, Etc.* v. *Brown,* 70 F. 2d 269 (C. C. A. 3d), affirming *per curiam,* 6 F. Supp. 582 (E. D. Pa.). The Ninth and Tenth Circuits have ruled otherwise in cases which may perhaps be distinguishable upon the particular facts involved but which are nevertheless basically in conflict with the decision herein. *Commissioner* v. *Bank of America,* 133 F. 2d 753 (C. C. A. 9th); *Commissioner* v. *F. G. Bonfils Trust,* 116 F. 2d 788 (C. C. A. 10th).

II

THE CAPITAL GAIN REALIZED BY THE TRUST IS NOT DEDUCTIBLE FROM NET INCOME UNDER SECTION 162 (a) AS INCOME "WHICH PURSUANT TO THE TERMS OF THE WILL * * * IS * * * PERMANENTLY SET ASIDE" FOR CHARITABLE PURPOSES

In 1937 the estate realized capital gains from the sale of securities in the amount of $100,900.31. It seeks to avoid income tax upon those gains under Section 162 (a) which exempts trust income "which pursuant to the terms of the will * * * is * * * permanently set aside" for specified charitable purposes. The Commissioner denied such special treatment for that income, in view of the decedent's directions to the trustee to pay over such part of the trust funds to his wife as might promote her "happiness."

Our discussion in Point I, *supra,* is equally applicable to dispose of petitioner's contention on this branch of this case. Indeed, the Govern-

ment's position here is even stronger, for the statutory language makes it plain beyond reasonable dispute not only that the income must be "permanently" set aside for charitable purposes, but also that we must look only to the "terms of the will" to ascertain whether the income will so be used. There is no basis for resorting to extrinsic evidence to determine the ultimate disposition of the funds. It was for the evident purpose of avoiding any such illusive inquiry that Congress imposed the condition that the charity's right to the funds be permanently fixed by the will itself. Certainly, the income in question was not "permanently" set aside for charitable purposes "pursuant to the terms of the will," since the will explicitly subjected it to the hazards of diversion for the "happiness" of the widow.

CONCLUSION

The decision of the court below is correct and should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES.

No. 30.—October Term, 1943.

Merchants National Bank of Boston, Executor, Petitioner, *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[November 15, 1943.]

Mr. Justice Rutledge delivered the opinion of the Court.

Ozro M. Field died in Massachusetts in 1936, leaving a gross estate of some $366,000. In his will he provided, after certain minor bequests, that the residue of his estate be held in trust, the income to go to his wife for life, and on her death all but $100,000 of the principal[1] to go "free and discharged of this trust" to certain named charities. Under the trust set up by the will, the trustee, petitioner here, was authorized to invade the corpus "at such time or times as my said Trustee shall in its sole discretion deem wise and proper for the comfort, support, maintenance, and/or happiness of my said wife, and it is my wish and will that in the exercise of its discretion with reference to such payments from the principal of the trust fund to my said wife, May L. Field, my said Trustee shall exercise its discretion with liberality to my said wife, and consider her welfare, comfort and happiness prior to claims of residuary beneficiaries under this trust."

In 1937 the trust realized gains of $100,900.31 from the sale of securities in its portfolio.

In filing estate and income tax returns petitioner, which was also Mr. Field's executor, sought to deduct $128,276.94 from the gross estate and the $100,900.31 from the 1937 income of the trust, on the theory that those sums constituted portions of a donation to charity and were therefore deductible respectively under

[1] The $100,000 was to remain in trust, the income to go in equal shares to his three adopted children and a niece of his wife, and on the death of the last of these beneficiaries the corpus was also to go to the named charities.

§ 303(a)(3) of the Revenue Act of 1926 (44 Stat. 72)[2] and § 162(a) of the Revenue Act of 1936 (49 Stat. 1706).[3]

The commissioner disallowed the deductions and determined deficiencies of $26,290.93 in estate tax and $42,825.69 in income tax for 1937, but on the taxpayer's petition for review the Board of Tax Appeals (now the Tax Court) upheld the latter's contentions. The Court of Appeals reversed the Board of Tax Appeals, 132 F. 2d 483, and we granted certiorari because of an asserted conflict with decisions of other circuit courts[4] and this Court.[5] (319 U. S. —.)

There is no question that the remaindermen here were charities. The case, at least under § 303(a)(3), turns on whether the bequests to the charities have, as of the testator's death, a "presently ascertainable" value or, put another way, on whether, as of that time, the extent to which the widow would divert the corpus from the charities could be measured accurately.

Although Congress, in permitting estate tax deductions for charitable bequests, used the language of outright transfer, it apparently envisaged deductions in some circumstances where contingencies, not resolved at the testator's death, create the possi-

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[2] Section 303 provides:

"For the purpose of the tax the value of the net estate shall be determined—

"(a) In the case of a resident, by deducting from the value of the gross estate—

. . . . . .

"(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes; . . ."

[3] Section 162 provides:

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

"(a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes. . . ."

[4] Compare the decision below with Hartford-Connecticut Trust Co. v. Eaton, 36 F. 2d 710 (C.C.A. 2d); First National Bank of Birmingham v. Snead, 24 F. 2d 186 (C.C.A. 5th); Lucas v. Mercantile Trust Co., 43 F. 2d 39 (C.C.A. 8th); Commissioner v. Bank of America Nat'l Trust & Savings Ass'n, 133 F. 2d 753 (C.C.A. 9th); Commissioner v. F. G. Benfils Trust, 115 F. 2d 788 (C.C.A. 10th).

[5] See Ithaca Trust Co. v. United States, 279 U. S. 151.

bility that only a calculable portion of the bequest may reach ultimately its charitable destination.[6] The Treasury has long accommodated the administration of the section to the narrow leeway thus allowed to charitable donors who wished to combine some private benefaction with their charitable gifts. The limit of permissible contingencies has been blocked out in a more convenient administrative form in Treasury Regulations which provide that, where a trust is created for both charitable and private purposes the charitable bequest, to be deductible, must have, at the testator's death, a value "presently ascertainable, and hence severable from the interest in favor of the private use,"[7] and further, to the extent that there is a power in a private donee or trustee to divert the property from the charity, "deduction will be limited to that portion, if any, of the property or fund which is exempt from an exercise of such power."[8] These Regulations are appropriate implementations of §303(a)(3), and, having been in effect under successive reenactments of that provision, define the framework of the inquiry in cases of this sort. Cf. *Helvering* v. *Winmill*, 305 U. S. 79; *Taft* v. *Commissioner*, 304 U. S. 351.

Whatever may be said with respect to computing the present value of the bequest of the testator who dilutes his charity only to the extent of first affording specific private legatees the usufruct of his property for a fixed period, a different problem is presented by the testator who, preferring to *insure* the comfort and happiness of his private legatees, hedges his philanthropy, and permits invasion of the corpus for their benefit. At the very least a possibility that part of the principal will be used is then created, and the present value of the remainder which the charity will receive becomes less readily ascertainable. Not infrequently the standards by which the extent of permissible diversion of corpus is to be measured embrace factors which cannot be accounted for accurately by reliable statistical data and techniques. Since, therefore, neither the amount which the private beneficiary

[6] E. g., the not unusual case of a bequest of income for life intervening between the testator and the charity, requiring computation, with the aid of reliable actuarial techniques and data, of present value from future worth. Compare the provisions for charitable deductions in the Revenue Acts of 1918—§ 403(a)(3) (40 Stat. 1098); 1921—§ 403(a)(3) (42 Stat. 279); 1924—§ 303(a)(3) (43 Stat. 306); 1926—§ 303(a)(3) (44 Stat. 72).

[7] Treasury Regulations 80 (1934 ed.) Art. 44.

[8] Treasury Regulations 80 (1934 ed.) Art. 47.

will use nor the present value of the gift can be computed, deduction is not permitted. Cf. *Humes* v. *United States*, 276 U. S. 487.

For a deduction under §303(a)(3) to be allowed, Congress and the Treasury require that a highly reliable appraisal of the amount the charity will receive be available, and made, at the death of the testator. Rough guesses, approximations, or even the relatively accurate valuations on which the market place might be willing to act are not sufficient. Cf. *Humes* v. *United States*, 276 U. S. 487, 494. Only where the conditions on which the extent of invasion of the corpus depends are fixed by reference to some readily ascertainable and reliably predictable facts do the amount which will be diverted from the charity and the present value of the bequest become adequately measurable. And, in these cases, the taxpayer has the burden of establishing that the amounts which will either be spent by the private beneficiary or reach the charity are thus accurately calculable. Cf. *Bank of America Nat'l Trust & Savings Ass'n* v. *Commissioner*, 126 F. 2d 48 (C. C. A.).

In this case the taxpayer could not sustain that burden. Decedent's will permitted invasion of the corpus of the trust for "the comfort, support, maintenance and/or happiness of my wife." It enjoined the trustee to be liberal in the matter, and to consider her "welfare, comfort and happiness" prior to the claims of residuary beneficiaries," i. e., the charities.

Under this will the extent to which the principal might be used was not restricted by a fixed standard based on the widow's prior way of life. Compare *Ithaca Trust Co.* v. *United States*, 279 U. S. 151. Here, for example, her "happiness" was among the factors to be considered by the trustee. The sums which her happiness might require to be expended are of course affected by the fact that the trust income was not insubstantial and that she was sixty-seven years old with substantial independent means and no dependent children.[2] And the laws of Massachusetts may restrict the exercise of the trustee's discretion somewhat more narrowly than a liberal reading of the will would suggest, although that is doubtful. Cf. *Dana* v. *Dana*, 185 Mass. 156; and compare

[2] The Board of Tax Appeals found that decedent had adopted three children—two girls and a boy—before his marriage to the present Mrs. Field. She never adopted the children. The two girls were married to husbands fully

Sparhawk v. *Goldthwaite*, 225 Mass. 414. Indeed one might well "guess, or gamble . . ., or even insure against" the principal being expended here. Cf. *Humes* v. *United States*, *supra*. But Congress has required a more reliable measure of possible expenditures and present value than is now available for computing what the charity will receive. The salient fact is that the purposes for which the widow could, and might wish to have the funds spent do not lend themselves to reliable prediction.[10] This is not a "standard fixed in fact and capable of being stated in definite terms of money." Cf. *Ithaca Trust Co.* v. *United States*, *supra*. Introducing the element of the widow's happiness and instructing the trustee to exercise its discretion with liberality to make her wishes prior to the claims of residuary beneficiaries brought into the calculation elements of speculation too large to be overcome, notwithstanding the widow's previous mode of life was modest and her own resources substantial. We conclude that the commissioner properly disallowed the deduction for estate tax purposes.

The deduction for income tax purposes stands on no better footing. Congress permitted a deduction of that part of gross income "which pursuant to the terms of the will . . . is during the taxable year . . . permanently set aside" for charitable purposes. In view of the explicit requirement that the income be permanently set aside, there is certainly no more occasion here than in the case of the estate tax to permit deduction of sums whose ultimate charitable destination is so uncertain.

Accordingly, the decision of the Court of Appeals is

Affirmed.

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able to support them, and the boy was nearly twenty one at the testator's death.

Immediately after decedent's death the widow owned income producing property worth about $194,000. Her total income from her own property and the trust, and the amounts she has actually expended have been as follows:

Period	*Income*	*Expenditures*
1936 (7 months)	$10,735.35	$1,853.99
1937	24,738.57	10,357.91
1938	17,480.85	11,055.91
1939	17,448.23	12,024.92
1940	16,959.06	13,389.31
	$87,362.06	$48,682.04

[10] E. g., the Board found that since her husband's death, Mrs. Field purchased two automobiles and a fur coat, took two pleasure trips, gave financial assistance to a niece, helped send a grand nephew through medical school, and purchased a fur coat for one of her husband's daughters.

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Mr. Justice Douglas, with whom Mr. Justice Jackson concurs, dissenting.

The Tax Court applied the correct rule of law in determining whether the gifts to charity were so uncertain as to disallow their deduction. That rule is that the deduction may be made if on the facts presented the amount of the charitable gifts are affected by "no uncertainty appreciably greater than the general uncertainty that attends human affairs." *Ithaca Trust Co.* v. *United States*, 279 U. S. 151, 154. In that event the standard fixed by the will is "capable of being stated in definite terms of money." *Id.*, p. 154. The mere possibility of invasion of the corpus is not enough to defeat the deduction. The Tax Court applied that test to these facts. 45 B. T. A. 270, 273-274. Where its findings are supported by substantial evidence they are conclusive. We may modify or reverse such a decision only if it is "not in accordance with law." 44 Stat. 110, 26 U. S. C. § 1141 (e) (i). See *Wilmington Trust Co.* v. *Helvering*, 316 U. S. 164, 168. The discretion to pay to the wife such principal amounts as the trustee deems proper for her "happiness" introduces of course an element of uncertainty beyond that which existed in the *Ithaca Trust Co.* case. There the trustee only had authority to withdraw from the principal and pay to the wife a sum "necessary to suitably maintain her in as much comfort as she now enjoys." But the frugality and conservatism of this New England corporate trustee, the habits and temperament of this sixty-seven year old lady, her scale of living, the nature of the investments—these facts might well make certain what on the face of the will might appear quite uncertain. We should let that factual determination of the Tax Court stand, even though we would decide differently were we the triers of fact.